TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 79.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CISCO OIL MILL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 13, 1905.

(19,845.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court for the county of Eastland	1	1
Caption	1	1
Plaintiff's first amended original petition	1	1
Original answer of defendant	24	14
Plaintiff's first supplemental petition	33	19
Judgment	34	20
Plaintiff's motion for a new trial	36	21
Plaintiff's amended motion for new trial	37	22
Judgment overruling motion for new trial	46	27
Findings of fact	47	28
Conclusions of law	52	31
Appeal bond	53	32
Plaintiff's bill of exceptions No. 1	55	33
No. 2	56	34
No. 3	58	35
No. 4	59	36
No. 5	61	37
No. 6	62	38
No. 7	64	39
No. 8	66	40
No. 9	67	41

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	Original.	Print.
Statement of facts		
Testimony of J. B. Spears	69	42
P. W. Reynolds	69	42
E. L. Sargent	71	43
H. L. Redfield	74	45
R. Fenby	78	47
G. S. Maxwell	83	50
George Langston	83	50
Judge's certificate to statement of facts	86	52
Assignment of errors	88	53
Cost bill	88	53
Certificate of district clerk	93	56
pinion	94	57
udgment	96	57
lotion for rehearing	99	59
rder overruling motion for rehearing	99	60
etition for writ of error	105	63
rit of error (copy)	105	63
ond on writ of error	112	68
itation in error (copy)	114	69
ssignments of error	115	70
ill of costs	116	70
riginal writ of error	121	73
riginal citation in error, with service	122	74
erk's certificate	124	75
	125	76

Transcript of Record.

4618.

pealed from the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE CISCO OIL MILL, Defendant in Error.

[Seal Court of Civil Appeals of the State of Texas.]

Caption.

E STATE OF TEXAS, *County of Eastland:*

At a term of the District Court begun and holden within and for county of Eastland, at Eastland, on the 4th day of January A. D. 4, and which adjourned on the 27th day of February A. D. 1904, Honorable J. H. Calhoun, Judge thereof presiding, the following se came on for trial, to wit:

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RAILWAY CO.

ntiff's 1st Amended Original Petition. Filed Feb'y 19th, 1904.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RAILWAY CO.

Pending in the District Court of Eastland County, Texas, January Term, 1904.

ow comes the plaintiff, leave of the court being first had, and files its First Amended Original Petition, in lieu of, and as a subste for, its Original Petition, herein filed on the 18th day of mber 1903, and says:

he Honorable Judge of the District Court in and for Eastland unty:

co Oil Mill, hereinafter styled plaintiff, complaining of Texas cific Railway Company, hereinafter styled defendant, respectshoweth the court:

The plaintiff is a private corporation, created and organized under and by virtue of the laws of the State of Texas, having and maintaining its domicile and principal office and place of business in Eastland County, Texas; and that Geo. T. Reynolds, who resides in Tarrant County, Texas, is president thereof; and that, at the several times and matters hereinafter mentioned and complained of, plain-
2 tiff owned and operated a cotton seed oil mill in the City of Cisco, in said Eastland County; that the defendant is a private corporation created and organized under the laws of the United States of America, and that it has and maintains a local agency in said Eastland County, Texas, and that R. L. Peck, who resides in the town and county of Eastland, is the local agent of the defendant therein and thereat.

That at the several times, and in the matters, hereinafter mentioned, referred to, and complained of, defendant was operating, and still operates a line of railway from the town of El Paso, in the State of Texas, to the city of New Orleans, in the state of Louisiana; that the line of defendant's said railway, at the time hereinafter mentioned and referred to, extended and ran through, and still extends and runs through the city of Cisco, in Eastland County, Texas, and to and through the towns of Alexandria, Cottonport, Moreauville, and Melville, in the State of Louisiana; and that, at said several times hereinafter mentioned and referred to, each of said towns were stations on defendant's said line of railway, where freight was received by defendant for transportation.

That, at said several times hereinafter mentioned and referred to, defendant was, and still is, a common carrier of freight, engag*a*ged in the business of carrying and transporting freight for the public for compensation, to and from the aforesaid towns and stations on its said line of railway; and that, as such common carrier, it became, and was, the duty of the defendant to receive, transport and carry freight and products of the kind and character hereinafter mentioned and referred to, when tendered to it at one of its stations,
3 for a fair, just and reasonable compensation; and that it then had, and now has, no legal right to charge, demand or receive an*d* unjust, exorbitant and unreasonable price for carrying and transporting freight.

That, at said several times hereinafter mentioned and referred to, the sum of thirty (30) cents per 100 pounds was a fair, just and reasonable price, charge and compensation for carrying and transporting cotton seed, in car load lots, in bulk, from the aforesaid towns of Moreauville, and Cottonport, in the State of Louisiana, to the said City of Cisco, in the State of Texas.

That, on to wit; the 20th, 26th and 28th days of September, 1901, plaintiff had at the said town of Moreauville, in the State of Louisiana, cotton-seed, in bulk, which it desired to have shipped and transported to the city of Cisco; and that, on each of said dates, the Planters Gin Co., acting for and on behalf of plaintiff, tendered to defendant, at said town of Moreauville, a car of cotton-seed, in bulk, to be shipped, carried and transported to the said city of Cisco, and there to be delivered to plaintiff, which said three cars of cotton-

seed *and* the defendant then and there received and accepted, and executed its three certain bills of lading therefor acknowledging the receipt thereof from the said Planters Gin Co., and promising, agreeing and undertaking to transport and carry the same to the said city of Cisco, and to there deliver the same to plaintiff. And that, on to wit; the 25th day of September 1901, plaintiff had a car load of cotton-seed at the aforesaid town of Cottonport, in the State of Louisiana, which it desired to have shipped, carried and transported to the said city of Cisco, and to there be delivered to plaintiff, which said car of cotton seed was, on the said 25th day of September 1901, tendered to defendant at said town of Cottonport by one
4 Lemoine, who was then and there acting for and on behalf of plaintiff, which defendant then and there received and accepted, and executed and delivered its bill of lading therefor acknowledging the receipt thereof from the said Lemoine, and promising, agreeing and undertaking to carry and transport the same to said City of Cisco, and to there deliver the same to plaintiff; that in said several bills of lading so executed by the defendant, no freight rate on said cotton seed therein specified, was named or mentioned; that, by reason of the premises, defendant promised and agreed and undertook to carry and transport said cotton seed from the said towns of Cottonport and Moreauville to the said City of Cisco for a fair, just and reasonable compensation, which plaintiff avers would have been, and was, thirty (30) cents per 100 pounds; that the said four cars of cotton seed so shipped over defendant's said railway, weighed, respectively, to wit; 40,530 pounds, 48,200 pounds, 40,090 pounds, and 44,610 pounds, and aggregated 173,430 pounds.

That, notwithstanding it was the duty of defendant to transport and carry said four cars of cotton seed from said towns of Cottonport and Moreauville to said city of Cisco, for a fair, just and reasonable compensation and charge, and that thirty (30) cents per hundred pounds would have been, and was, a fair, just and reasonable price, charge and compensation for so carrying and transporting the same, when the said four cars of cotton seed arrived at said city of Cisco, the defendant demanded of plaintiff the sum of sixty seven (67) cents per hundred pounds for freight charges thereon; and that plaintiff, in order to get possession of its said four cars of cotton seed was compelled to pay, and did pay, the sum of sixty seven (67) cents per hundred pounds freight charges thereon; that the
5 amount of unjust, unreasonable and excessive and unfair and unjust freight charges so demanded and collected and received of and from plaintiff on said four cars of cotton seed aggregated to the amount of, to wit; $641.69 in this; that the total freight charges on said four cars of cotton seed at thirty (30) cents per hundred pounds, which plaintiff avers would have been, and was, just and reasonable compensation for carrying and transporting the same, and that, at this rate, the total freight charges would have been, and amounted to, to wit; $520.29 while the defendant demanded and charged, and compelled plaintiff to pay to it, freight on the said four cars of cotton seed at the rate of sixty seven (67) cents per 100 pounds, which amounted, in the aggregate to the sum of, to wit;

$1161.98 which said last mentioned sum and amount of defendant demanded of and from plaintiff, and required and compelled plaintiff to pay the same before defendant would deliver to plaintiff its said four cars of cotton seed; and that plaintiff was required to pay, to defendant the said sum of, *of* to wit; $1161.98 before it could get possession of its said cotton seed, the same being so paid by plaintiff under protest.

That said sum of excessive freight so paid to defendant by plaintiff on said four cars of cotton seed was paid to, and received by, defendant as follows: to wit: $149.96 cents on September 28th, $178.34 on September 30th, $148.33 on October 2nd 1901, and $165.06 on October 3rd, 1901.

That prior to purchasing said four car loads of cotton seed, at said towns of Cottonport and Moreauville, in the State of Louisiana, plaintiff, for the purpose of finding out what the freight charges and rates would be on cotton seed, in bulk from points in Louisiana east of the aforesaid town of Alexandria, to said city of Cisco,
6 had its business manager call upon the agent of defendant at Cisco, Texas; but when said business manager called upon said agent, which he did prior to the purchase of said cotton seed by plaintiff, and requested the privileges of examining the freight tariff rates of defendant on cotton seed from points in Louisiana east of said town of Alexandria; said agent informed plaintiff's manager that he did not have the tariff rates, or that if he did, he could not find them, whereupon plaintiff's said manager asked defendant's said agent what the freight rates of cotton seed from that territory to Cisco would be, when he replied that he did not know, but that the through rates from points on defendant's railway east of Alexandria would be something less than the sum of the local rates from the shipping point to Alexandria, and the rate from said Alexandria to Cisco; plaintiff's said manager called upon defendant's said agent at Cisco in reference to these rates a second time; but could get no information in addition to that given him the first time he called upon said agent; at both times plaintiff's said manager so called upon defendant's said agent he demanded that the published tariffs promulgated by defendant showing freight rates on cotton seed from Louisiana points to Cisco be shown him; and in both instances said agent told and informed plaintiff's said manager that he, defendant's said agent, could not find said freight tariffs, and that he could not produce the same for inspection and examination by said manager, nor could plaintiff's said manager find said freight tariffs posted up at, or in, any place in defendant's freight depot, or freight office at Cisco, and did not have, and could not obtain an opportunity of inspecting and examining the same; that upon each and both
7 said occasions when plaintiff's said manager so called on the agent of defendant at Cisco, as aforesaid, he, said agent of defendant, informed and told plaintiff's said manager, that the freight rate on cotton seed, in car load lots, from stations and points on defendant's said railway line east of said town of Alexandria to Cisco, would be something less than local freight rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco;

that both said towns and stations of Cottonport and Moreauville are stations on defendant's said railway east of said town of Alexandria; and that, at the time of the aforesaid shipment of cottonseed, the freight rate on cotton seed, in bulk, in car load lots, from said towns of Moreauville and Cottonport to Alexandria was Ten (10) cents per 100 pounds, and the rate on cotton seed, in bulk, in car load lots, from Alexandria to Cisco, was twenty (20) cents per 100 pounds; that plaintiff purchased said four car loads of cotton seed at said towns of Cottonport and Moreauville and shipped, or caused the same to be shipped to it at Cisco, believing that the statements of defendant's said agent in reference to the freight rate thereon was true, and that the local freight from said shipping points to Cisco, would not exceed, but would be less than, the local rate from Cottonport and Moreauville to Alexandria, which plaintiff avers was ten (10) cents per 100 pounds, plus the rate from Alexandria to Cisco, which plaintiff avers was twenty (20) cents per 100 pounds, and that the total freight rate would not exceed thirty (30) cents per 100 pounds; that said freight rate of sixty-seven (67) cents per hundred pounds charged, demanded and collected of and from plaintiff by the defendant on said four cars of cotton seed, was unjust, unfair, exhorbitant and pro-
8 hibitive, and that if plaintiff had known such rate and charge would be demanded of and from it, it would not have *been* purchased nor shipped said cotton seed. That subsequently and about the time of the aforesaid shipment, plaintiff did ship cotton seed, in bulk, in car load lots, from points east of said town of Alexandria, on defendant's said line of railway, and on and over the same to Cisco, Texas for much less than sixty seven (67) cents per hundred pounds; that these shipments were made as follows; that is, the cotton seed were shipped to Alexandria, at the local freight rate from point of shipment to said Alexandria, and then reshipped from said Alexandria to Cisco at the rate of twenty (20) cents per 100 pounds; and that, had the freight rate on the aforesaid four cars of cotton seed not exceeded the sum of the rates from the points of shipment to Alexandria, and from Alexandria to Cisco, the total freight rate would have not exceeded the sum of thirty (30) cents per 100 pounds.

That, by reason of the premises, defendant became liable and bound to refund and repay to plaintiff the aforesaid sum of $641.69 with interest thereon from the 3rd day of October 1901, at the rate of six per cent. per annum.

That during, and prior to, September and October 1901 plaintiff owned and operated a cotton seed oil mill at, and in, the town of Cisco, Texas, and at said times, and dates, hereinafter mentioned and referred to, was purchasing cotton seed in the markets, for consumption by its said mill.

That prior to September 1901, defendant had issued and established tariffs for charges and freights for the transportation of cotton seed, in bulk, in car load lots, between stations on its railway line in the state of Louisiana as follows, to wit: for 50 miles and
9 over 40 miles, ten (10) cents per 100 pounds; said freight rate being applicable to cotton seed, in bulk, in car loads of

not less than the minimum weight prescribed by the rules, tariffs and regulations of defendant.

That, at said time, the rates and freight charges, as published and made public by the defendant, and as actually charged by it, for carrying cotton seed, in bulk, in car load lots, per 100 pounds, on the basis of, the distances from the said towns of Moreauville and Cottonport, to said town of Alexandria, in the State of Louisiana, was ten (10) cents per 100 pounds; and that such was the published rates, and the rates actually demanded and charged, by the defendant for carrying and transporting cotton seed, in bulk, in car load lots between the said towns of Cottonport and Moreauville and the said town of Alexandria, at the sa-d several times and dates hereinafter mentioned and referred to. That said towns of Cottonport and Moreauville are stations on defendant's said line of railway east of said town of Alexandria. Said town of Cottonport being about 40 4/10 miles east of Alexandria, and Moreauville being about 48 31/100 miles east of said Alexandria each of said towns of Cottonport and Moreauville being more than forty (40) and less than fifty (50) miles east of said Alexandria.

That the said town of Cisco is, and was, at the said several times hereinafter mentioned and referred to, a station on defendant's said line of railway about 449 1/2 miles west of said town of Alexandria, being more than 300 miles and less than 500 miles west of said town of Alexandria; and that said town of Alexandria is intermediate between said towns of Moreauville and Cottonport and said town of Cisco; and that said town of Cisco is a station of defendant's said line of railway intermediate between said town of Alexandria and the town of El Paso in the state of Texas, and between said town of El Paso and the town of Melville, in the state of Louisiana, which said last mentioned town is also a station on defendant's said line of railway. That said town of El Paso is about 947 8/10 miles of Melville and about 498 3/10 miles west of Cisco.

That at, and prior to, the said several times hereinafter mentioned and referred to, defendant had made, established and promulgated and made public its freight rates on cotton seed, in bulk in car load lots, moving between the said town of Alexandria in the state of Louisiana, and points west thereof as follows, to wit: for 500 miles and over 300 miles twenty (20) cents per 100 pounds; which said freight rate was effective and in force at the time of the several shipments of cotton seed hereinafter mentioned and referred to; and that, at said several times hereinafter mentioned and referred to, defendant had made, established, promulgated and put in force and effect, freight rates of cotton seed, in bulk, in car load lots, from said town of Alexandria and Melville, in the state of Louisiana, to said town of El Paso, in the state of Texas, at thirty-five (35) cents per hundred pounds, which said freight rate was effective at the time of the several shipments of cotton seed hereinafter mentioned and referred to. That by reason of this thirty five (35) cents per 100 pounds freight rate on cotton seed moving from said towns of Mel-

ville and Alexandria to said town of El Paso, a shipper could ship cotton seed, in bulk, in car load lots, from each and both of said towns of Melville and El Paso, through said town of Cisco, and about 498 miles west thereof, to El Paso at a freight rate of thirty five (35) cents per 100 pounds.

That it is, and was, at the said several times hereinafter mentioned and referred to, the duty of defendant to demand and charge
11 not more than a fair, reasonable and just rate and compensation for carrying and transporting freight over its said line of railway; and that a freight charge or rate, unreasonable in amount, is and was, at the said several times hereinafter mentioned and referred to, unfair, unreasonable, unjust and illegal and wrongful; and that, in law, the defendant is not, and was not at the several times hereinafter mentioned and referred to, permitted to charge more for a short haul than for a long one; and that in law, the defendant is not, and was not, at the several times hereinafter mentioned and referred to permitted to charge more for the transportation of cotton seed over its said railway line than the sum of its legal rates between the aforesaid points of shipment; that is, it would not be permitted, in law, to charge more for carrying and transporting cotton seed from Moreauville and Cottonport to Cisco, than the sum of the rates from Moreauville and Cottonport to Alexandria, and from Alexandria to Cisco.

That it is, and was, at the time of the several shipments of cotton seed hereinafter mentioned and referred to, the duty of the defendant railway company to have printed and posted in each and every one of its depots, stations and offices where freight is, and was, received for transportation, schedules showing the freight rates for transportation of property over its said railway, which it had established, and which were in force and effect at the time of said several shipments hereinafter mentioned and referred to.

That on, to wit; the 20th, 26th and 28th days of September 1901, plaintiff had, at the aforesaid towns and stations of Cottonport and Moreauville, in the state of Louisiana, four car loads of cotton
12 seed in bulk, which it had previously purchased at said points, and which it desired to have shipped and transported over defendant's said line of railway from said respective towns to the aforesaid town of Cisco, in car loads in bulk, and said four loads of cotton seed were delivered to defendant on said dates by parties acting for and on behalf of plaintiff, to be so transported and carried; that in the shipment of three of said cars from said town of Moreauville, the Planters Gin Co., acting for and on behalf of plaintiff tendered to defendant a car load of cotton seed, in bulk, on each of the dates of 20th, 26th, and 28th days of September 1901, that in the shipment of one car from said town of Cottonport, one Lemoine acting for and on behalf of plaintiff tendered to defendant one car of cotton seed, in bulk, on the 25th day of September 1901; that when the said four cars of cotton seed were so tendered to defendant for shipment and transportation to said town of Cisco, it received the same and executed its certain four bills of lading therefor, wherein and whereby it undertook, promised and agreed to

transport and carry said four cars of cotton seed to Cisco, Texas, and to there deliver the same to plaintiff; that in said bill of lading so executed by defendant no freight rate on the said four cars of cotton seed was named or specified; said bills of lading are attached to plaintiff's Original Petition herein filed, marked exhibit- A. B. C. & D. respectively and reference thereunto is here made.

That, by reason of the aforesaid freight rates, and freight tariffs, made, promulgated and made public by the defendant, plaintiff was entitled to have its said cotton seed transported and carried from the said towns of Moreauville and Cottonport to said town of
13 Cisco, at the rate of thirty (30) cents per 100 pounds, for this; that the aggregate of the local freight rates, so made, promulgated and made public by defendant between said towns of Moreauville and Cottonport and said town of Alexandria would have been, and was, ten (10) cents per 100 pounds, and the published and proclaimed rate from said Alexandria to Cisco was twenty (20) cents per 100 pounds, and the sum of the two rates would be, and was, thirty (30) cents per 100 pounds.

That it was its duty, and the defendant was, in law, obligated and bound to transport and carry said four cars of cotton seed from the said towns of Moreauville and Cottonport to the said town of Cisco, for a sum, charge and compensation, not exceeding the sum of the two intervening local-; that is, the sum of ten (10) cents per hundred pounds, the rate from Moreauville and Cottonport to said town of Alexandria, plus twenty (20) cents the rate from said town of Alexandria to Cisco.

That prior to purchasing the said four car loads of cotton seed, and prior to the shipment of the same over defendant's said railway, as aforesaid, plaintiff, acting by and through its general manager at Cisco, went to the freight depot, and freight office of the defendant at, and in said town of Cisco, and demanded of the agent of defendant at, and in said town, that he, said manager be shown the published and established freight rates and freights charges that were then effective and in force on defendant's said railway on cotton seed, in bulk, in car load lots, from points and stations on defendant's railway in Louisiana not more than 100 miles east of the aforesaid town of Alexandria, but defendant's said agent then and there informed plaintiff's said manager that he, said agent, could not find
14 said printed tariffs and rates; that the plaintiff's said manager could not, and did not, find or discover any such printed tariffs or schedules showing freight rates on cotton seed posted in defendant's said freight depot or freight office; that subsequently, and prior to the shipment of said cotton seed plaintiff's said manager again called upon defendant's said agent at Cisco, and demanded that he be shown such printed schedules and freight tariff rates on cotton seed moving over defendant's said railway from points east of the said town of Alexandria: Whereupon defendant's said agent could not find such printed tariff and schedules showing the freight rates from said points; and defendant's said manager did not, and could not find any such printed schedules or tariffs showing the freight rates effective and in force over defendant's said railway from

said points and stations on its railway east of said town of Alexandria, and such schedules or tariffs were posted in defendant's said freight depot or freight office, where it receives freight for transportation, at Cisco, Texas. That when defendant's said manager discovered that there were no printed schedules or tariffs showing freight rates on shipments from said points, posted in defendant's said depot or freight office, he asked defendant's said freight agent what the freight rate on cotton seed, in bulk, in car load lots, would be from points of defendant's said railway, *in bulk in car load lots, would be from points on defendant's said railway* in Louisiana, east of said town of Alexandria, he, defendant's said agent, informed and told plaintiff's said manager that he, defendant's said agent, could not tell exactly what the freight would be, but that it would be something less than the local rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco; and defendant, relying upon the
15 information so given it by defendant in reference to said freight rates, and knowing that the rate from Alexandria to Cisco, on cotton seed, in bulk, in car load lots was twenty (20) cents per 100 pounds, had reason to believe and did believe that the freight rate on cotton seed, in bulk, in car load lots, from points no further east of Alexandria than Cottonport and Moreauville to Cisco, would not exceed the sum of thirty (30) cents per 100 pounds, purchased said cotton seed, and shipped them to Cisco over defendant's said railway, as aforesaid.

Defendant avers that each and every of said four cars of cotton seed, so shipped over defendant's said railway exceeded in weight the minimum weight for a car load of cotton seed, in bulk, as prescribed by the tariff's schedules and regulations of defendant.

That, notwithstanding it was, at the time of said shipments, the duty of defendant to receive said cotton seed when tendered in car load lots, of not less than the minimum weight prescribed by its tariffs, rules and regulations, and to transport and carry the same to Cisco for a sum, or rate, of not exceeding thirty (30) cents per 100 pounds, when said four cars arrived at Cisco, defendant demanded of, and from plaintiff, freight charges thereon at the rate of sixty seven cents per 100 pounds, a sum, rate and charge unjust, unreasonable, prohibitive, discriminative and illegal, and which said sum, rate and charge plaintiff was compelled to pay, and did pay under protest to defendant before it, plaintiff, could get possession of its said cotton seed. That said four cars of cotton seed so shipped over defendant's said railway, weighed respectively, to wit; 40,530 pounds, 48,200 pounds, 40,090 pounds and 44,610 pounds, aggregating a total weight of, to wit; 173,430 pounds; and the freight charges
16 thereon at the rate of sixty-seven (67) cents per hundred pounds, which defendant demanded of and from plaintiff, and which plaintiff was compelled to pay, and did pay, to defendant as aforesaid, amounted to the sum of, to wit; $1,161.98; that at a freight rate of thirty (30) cents per 100 pounds, which defendant avers would have been, and was, a fair, just, reasonable and legal freight rate and charges on said four cars of cotton seed, that being the sum of the rate from Cottonport and Moreauville to Alexandria plus the rate from Alexandria to Cisco, would have amounted to, and

aggregated, the sum of $520.29. That thereby defendant unlawfully and injustly extorted of and from plaintiff the sum of $641.69 in excess of what the fair, reasonable, just and legal freight charges should have been on said four cars of cotton seed; which said sum of excessive, unjust, unreasonable and unlawful freight charges, plaintiff was compelled to pay, and did, to defendant on said four cars of cotton seed. That said sum *was* excessive, unjust, unreasonable and unlawful freight charges on said four cars of cotton seed was paid to the defendant by plaintiff, as follows, to wit; $149.96 thereon on September 28th, 1901; $178.34, thereof on September 30th 1901; $148.33 thereof on October 2nd, 1901, and $165.06 thereof on October 3rd, 1901.

That, as hereinbefore alleged and set out, defendant railway company at, and prior to the said several times herein before mentioned and referred to, had established and put into effect freight rates on cotton seed, in bulk, in car load lots, from its stations in the state of Louisiana including the aforesaid towns and stations of Melville and Alexandria, to the aforesaid town of El Paso, in the state of
17 Texas, at thirty five (35) cents per hundred pounds; and that, by reason of said rates, parties and persons could ship, and defendant would transport and carry cotton seed, in bulk, in car load lots, from said Melville and Alexandria to said El Paso at the rate of thirty five (35) cents per 100 pounds; that such shipments of cotton seed would be transported and carried through the said town of Cisco, and about 498 miles west thereof to said El Paso, that in other words for thirty five (35) cents for 100 pounds, the defendant would carry and transport, at the time the aforesaid shipments were made, cotton seed, in bulk, in car load lots, from said town of Melville, which is much further east of Cisco than either Cottonport or Moreauville, through Cisco and practically 500 miles west thereof to El Paso a distance of about 1000 miles, while it charged, demanded and collected of and from plaintiff freight at the rate of sixty seven (67) cents per 100 pounds for carrying and transporting its said cotton seed less than 500 miles;

That the said town of Cisco is a station on defendant's said railway intermediate and between the said town of Melville, in the state of Louisiana and the town of El Paso in the State of Texas.

That defendant, wrongfully and unlawfully extorted from plaintiff, and required plaintiff to pay to it, as aforesaid, in order to get possession of its said four cars of cotton seed the sum of $1161.98, which exceeded the freight rate and charges on like commodities from Melville to El Paso in the sum of $554.98, that is to say, the freight charges on said four cars of cotton seed from Melville to El Paso, at thirty five (35) cents per 100 pounds would have been, and amounted to, the sum of, to wit; $607.00, while the de-
18 fendant demanded of, and required plaintiff to pay, freight thereon at the rate of sixty seven (67) cents per 100 pounds which amounted to, and aggregated, the sum of $1161.98. That, by its said action, in demanding of, and requiring payment by, plaintiff of said unreasonable, unfair, unjust and illegal freight charges on said cotton seed, defendant discriminated against said

town of Cisco and in favor of other towns and stations on its said railway, and also discriminated against plaintiff and in favor of other shippers over its said railway; and charged more for a short haul than for a long one, the shorter being included within the longer.

That, by reason of its aforesaid action, defendant *was* wrongfully, unjustly and illegally charged plaintiff for carrying and transporting its aforesaid cotton seed and unreasonable, unjust, unfair and unlawful freight rate the excess amounting to the sum of, to wit: $554.98 as hereinbefore stated, which said sum and amount defendant became liable and bound to refund and pay to plaintiff, with interest thereon at the rate of six per centum per annum, together with a reasonable attorney's fee, which plaintiff alleges to be the sum of $250.00 and all costs of suit. That prior to the purchase and shipment of the aforesaid four cars of cotton seed over defendant's said railway, plaintiff for the purpose of learning what the freight rates and charges on cotton seed, in bulk, in car load lots, over defendant's said railway from stations and points in the state of Louisiana east of Alexandria to Cisco, Texas, would be, had and caused its business manager to call upon the freight agent of defendant at Cisco, Texas, and ask, and inquire of him what such freight rates would be, and demanded that the printed tariffs and schedules showing such freight rates be shown to him, said manager,
19 but said agent of defendant then and there told and informed plaintiff's said manager that he said agent, could not find said printed schedules and tariffs; and plaintiff's said manager could find no printed schedules or tariffs showing the freight rates on cotton seed, over defendant's said railway from points and stations east of Alexandria to Cisco, posted in defendant's freight depot, or freight office, at Cisco, and that no such printed tariffs or schedules were so posted in said freight depot or freight office. That, at said time, plaintiff's said manager asked and inquired of the defendant's said agent what the freight rate would be on cotton seed, in bulk, in car load lots, over defendant's railway from points and stations in Louisiana east of said town of Alexandria; said agent then and there informed and told plaintiff's said manager that he, said agent of defendant, could not tell exactly what such freight rates and charges would be but that the through freight rate on such cotton seed from points and stations on defendant's said railway in Louisiana east of Alexandria to Cisco would be something less than the local rate from the point of shipment to Alexandria, plus the rate from Alexandria to Cisco; that subsequently and prior to the purchase and shipment of said four cars of cotton seed, plaintiff's said manager again called upon defendant's said freight agent at Cisco, for the purpose of learning what said freight rates would be, and at this time defendant's said agent informed and told plaintiff's said manager, that he said agent could not find any tariffs of schedules showing such rates, and that he, said agent, could not say just what the said freight rates would be, but that they would be something less than the rate from the point of shipment to Alexandria plus the

rate from Alexandria to Cisco; that at this time, and at
20 previous times plaintiff's said manager called upon said agent of defendant, he, said manager, could find posted in defendant's freight depot or freight office, where freight is received for shipment by defendant in Cisco, no printed tariffs or schedules showing the freight rate and charges on cotton seed from and to any of the points and stations on defendant's said railway, in this petition mentioned and referred to, and that no such printed tariffs or schedules were posted in defendant's said freight depot or freight office at any, or either times, said manager so went there for the purpose of learning what said freight rates and charges would be.

That defendant, relying upon the statement made and information furnished to its said manager by defendant's said agent, to the effect that the total freight rate on cotton seed, in bulk in car load lots, from points and stations on defendant's said railway in Louisiana east of Alexandria to Cisco, would not exceed the sum of the local rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco, and knowing that the freight rate on cotton seed, in bulk, in car load lots, from Alexandria to Cis-, then effective and in force on defendant's said railway, was twenty (20) cents per 100 pounds, and believing that the freight rate thereon from points and stations on defendant's said railway east of Alexandria, and within fifty miles thereof, would not exceed ten (10) cents per 100 lbs, and believing that the total freight rate on said cotton seed from points not exceeding 50 miles east of Alexandria to Cisco would not exceed thirty (30) cents per 100 pounds, plaintiff sent its purchasing agent into Louisiana to the said towns of Cottonport and Moreauville, to purchase and ship cotton seed to its
21 said mill at Cisco, who purchased and shipped the four cars of cotton seed hereinbefore mentioned and referred to. That upon the arrival of said four cars of cotton seed at Cisco, defendant demanded of and required plaintiff to pay freight thereon at the rate of sixty seven cents per 100 pounds, which said freight, at said rate amounted to the sum of $1161.98, and which the plaintiff was then and there required and compelled to pay and did pay, to defendant, that, at the rate of thirty (30) cents per 100 pounds, the freight on said cotton seed would only have amounted to the sum of to wit: $520.29; and that the amount so paid by plaintiff in excess of what defendant's said agent informed plaintiff's said manager what the freight thereon would be was the sum of to wit: $641.69.

That if there had been posted in defendant's said freight depot, or freight office, printed tariffs and schedules showing the freight rate on cotton seed, in bulk, in car load lots, over its said railway from Cottonport and Moreauville to Cisco to be sixty seven (67) cents, or any other excessive or prohibitive rate, plaintiff would have not purchased said four cars of cotton seed, nor shipped the same, or any or either of them over defendant's said railway; and that, if defendant's said agent at Cisco had not informed and told plaintiff's said manager that the freight rate on cotton seed moving over defendant's said railway from points and stations on its line in Louisi-

ana east of Alexandria to Cisco, would not exceed the sum of the local freight rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco as aforesaid plaintiff would have not purchased or shipped any, or either, of the aforesaid four cars of cotton seed. But that in purchasing and shipping each and every of said four cars of cotton seed, plaintiff relied upon the said
22 statement so made to its said manager by defendant's agent at Cisco, to the effect that the freight rate on cotton seed shipments from Cottonport and Moreauville to Cisco would not exceed, but would be something less than the sum of rate from said Cottonport and Moreauville to Alexandria, plus the rate from Alexandria to Cisco; and that if it had known, or had reason to believe that defendant would demand and require of and from plaintiff freight on said cotton seed at the rate of sixty seven (67) cents per 100 pounds, it, plaintiff would have not purchased nor shipped said cotton seed, because of the fact, that said freight rate was prohibitive and made said cotton seed cost plaintiff a price far in excess of what it could possibly realize out of them in its business.

Wherefore, because of the fact that defendant's said agent prior to said shipments, told and informed plaintiff's said manager that freight rates on said cotton seed would not exceed, but would be less than the rate from the points of shipment to Alexandria, plus the rate from Alexandria to Cisco, and because plaintiff relied on said statements so made to its said manager, and because said rate had the statement of defendant's said agent been true, would have been thirty (30) cents per 100 pounds, and because the further fact that if defendant had had posted in its said freight depot, or freight office where it received freight for shipment, printed tariffs and schedules showing the freight rate on cotton seed between Cottonport and Moreauville and the town of Cisco, as required by law, and said tariffs and schedules had shown such freight rate to be sixty seven (67) cents per 100 pounds, or any other excessive or prohibitive freight rate, plaintiff would not have purchased or
23 shipped said four cars of cotton seed, or any, or either of them, or any part thereof.

By reason whereof defendant is estopped to deny that the aforesaid freight rate of thirty (30) cents per hundred pounds, on said four cars of cotton seed is a fair, just, reasonable and legal rate thereon, and that it ought not be required to refund and repay to plaintiff the aforesaid sum of $641.69 excessive freight, freight charged, demanded and collected of, and from plaintiff on the aforesaid four cars of cotton seed.

Wherefore, premises considered, and defendant having been served with process and now being in court, plaintiff prays that it have and recover of and from the defendant;

First. The aforesaid sum of $641.69, with interest thereon from the 3rd day of October 1901, at the rate of 6 per centum per annum, the sum of $250.00 for its attorney's fees, and all costs of suit; or,

Second. If plaintiff be not entitled to recover the said sum of $641.69, that it have and recover of and from defendant the aforesaid sum of $554.98, with interest thereon from the 3rd day of Octo-

ber 1901, for $250.00 attorney's fees, together with all costs of suit; and for such other, or further relief, or both, as it may, by reason of the premises be entitled.

J. J. BUTTS,
Attorney for Plaintiff.

(Endorsed:) No. 1458, Cisco Oil Mill, *vs.* Texas & Pacific Railway Co. Plaintiff's First Amended Original Petition. Filed
24 Feb'y 19th, 1904. R. L. Davenport, Clerk Dist. Court Eastland Co. Texas.

Original Answer of Def't.

Filed 2/19/04.

No. 1458.

CISCO OIL MILL
vs.
THE TEXAS & PACIFIC RY. COMPANY.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Now comes the defendant, The Texas & Pacific Railway Company, and for answer in this behalf says:—

(1) It plainly appears from plaintiff's first amended original petition, filed herein on the — day of — 1904 that shipments in controversy are interstate shipments; that said shipments originated in the state of Louisiana at the towns of Moreauville and Cottonport; that the destination of the cotton seed involved in each shipment in controversy was Cisco, Texas; that it plainly appears from plaintiff's said first amended original petition that said shipments were subject to and were made under the provisions and regulations of the interstate commission act only; and that said shipments were and are subject to the act of Congress and the terms and provisions of the Federal Statute relating to and regulating the transportation of commerce from one state into another, and cross and through another state other than the origination of said shipcmtns, and the controversy in this case arises under the law of the United States relating to a subject matter over which Congress has exclusive control; that by the terms of said Federal Statute a party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the interstate commerce law as regulated exclusively to the Commission or the Federal Court; in other words, a party who seeks damages alleged to have been sustained in consequence
25 of a violation of said interstate commerce law, because of the commission or omission of any act on the part of a common carrier, must bring his cause of action, if any he has, in some federal court of competent jurisdiction, or by proper complaint filed with and properly prosecuted before said Interstate Commerce Commis-

sion. This defendant further says and alleges that this court is without jurisdiction to hear and determine the rights of the plaintiff and the cause of action alleged and sought to be maintained against this defendant by the plaintiff in this cause.

Wherefore, this defendant prays the court upon hearing hereof to dismiss this case at cost of plaintiff, and that this defendant be permitted to go hence without day, and recover its costs in this behalf incurred against plaintiff as it will ever pray, etc.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Attorneys for the Texas & Pacific Ry. Co., Defendant.

Now comes H. C. Shropshire, attorney for the defendant The Texas & Pacific Railway Company, who upon oath says that the above and foregoing plea in abatement, and the matters of fact therein contained are true.

—— ——.

Sworn and subscribed to before me this — day of — 1904.

—— ——,
Clerk District Court, Eastland County, Texas.

(2) This defendant excepts to each and singular and all of the allegations in plaintiff's petition contained, says the same are insufficient in law for plaintiff to have and maintain this or any other cause of action upon the allegations therein, and of the sufficiency thereof prays judgment of the court.

B. G. BIDWELL & SHROPSHIRE,
Att'y- for T. & P. Ry. Co., Def't.

(3) For special exception herein defendant says plaintiff's first amended original petition herein filed is insufficient in law for plaintiff to have and maintain this or any other cause of action upon the allegations therein contained, because it plainly appears from the face and the allegations contained in said first amended original petition that plaintiff, if any cause of action he has against this defendant, can only prosecute and maintain the same in some federal court of competent jurisdiction, or by proper complaint filed with and properly prosecuted before the interstate commerce commission of the United States of America, and of the sufficiency thereof this defendant prays judgment of the court.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for T. & P. Ry. Co., Def't.

(4) For further special exception to plaintiff's first amended original petition filed herein this defendant says said petition is insufficient in law, (1) because it plainly appears from the face and allegations of said petition that plaintiff, if any cause of action he has, is seeking to recover damages from this defendant because of the charge and collection of a freight and tariff rate charged and

collected by this defendant from plaintiff in contravention of the provisions of the interstate commerce law; (2) because it does not appear from the allegations contained in plaintiff's said first amended original petition that this defendant demanded or collected any sum or sums of money, or any rate or rates, not provided and contained in its schedule of rate filed before the interstate commerce
27 commission of the United States of America; (3) because it does not appear from said petition and the allegations therein contained that this defendant demanded or collected from plaintiff as compensation for the transportation of the cotton seed mentioned in plaintiff's petition any sum or sums of money in excess of the amount it was entitled and compelled to collect and demand from plaintiff for the transportation of said cotton seed from the point of origination to the point of destination, as provided by its schedule of rate on file with the Interstate Commerce Commission of the United States of America, and in force and effect at the time of said shipments, and of the sufficiency thereof this defendant prays judgment of the court.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

(5) For further special exception this defendant says all that part of plaintiff's first amended original petition wherein it is alleged and charged that a freight charge or rate unreasonable in amount and discriminative in behalf of any community and in favor of another community, and discriminative in favor of one individual or shipper against another individual or shipper, is insufficient in law, (1) because it appears from plaintiff's amended original petition filed herein that this is a suit brought by plaintiff to recover damages because of the excessive charge and collection of other than the legal rate entitled to be charged and collected for the transportation of the cotton seed in plaintiff's amended original petition mentioned, and it is nowhere alleged in said first amended original petition that this defendant ever charged any other individual or shipper a differ-
28 ent rate to that charged and collected from plaintiff on the occasions mentioned in the said first amended original petition; (2) because it does not appear from plaintiff's said first amended original petition that this defendant ever charged any other person or persons living and residing in any other community a different or other rate for like services to that charged and collected from the plaintiff herein, as alleged, and of the sufficiency thereof this defendant prays judgment of the court.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

(6) For further special exception this defendant says that all that part of plaintiff's first amended original petition wherein it is alleged that by its said action in demanding of and requiring payment by plaintiff of said unreasonable, unfair, unjust and illegal

freight charges of said cotton seed defendant discriminated against said town of Cisco, and in favor of other towns and stations on its said railway, and also discriminated against plaintiff and in favor of other shippers over its said railway, is insufficient in law, (1) because this is a suit sought to be maintained by plaintiff against this defendant to recover such damages as it personally sustained because of the shipments in controversy, and is not a suit by the community of Cisco, or any other community of the people thereof, to recover damages because of any act of discrimination on the part of this defendant; (2) because it does not appear and is not alleged in plaintiff's first amended original petition that this defendant at the time alleged by claimant delivered to any other person in the town of Cisco any freight or rendered like services for a
29 greater or less compensation than that demanded and collected from the plaintiff for the transportation of the cotton seed in controversy; (3) because it does not appear and is nowhere alleged in plaintiff's first amended original petition that this defendant contemporaneously therewith transported any cotton seed or like freight from the town of Moreauville and Cottonport, Louisiana, to any community or town in the vicinity of Cisco upon a through shipment for a less or greater compensation than that charged and collected from plaintiff at the time in controversy, and of the sufficiency thereof, this defendant prays judgment of the court.

B. G. BISWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

(7) Subject to the foregoing plea in abatement and general and special exceptions, or without waiving any or all of the same, but insisting upon each and all of the same, in case this defendant be required to answer further, this defendant denies each and singular the allegations in plaintiff's petition contained, says the same are not true in fact, and demands strict proof of the same, and of this it puts itself upon the country.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

(8) For special answer in this behalf, if this defendant be required to answer further, this defendant says that at the time and prior to the time of the shipments made as alleged in plaintiff's first amended originai petition, and long prior thereto, this defendant did promulgate, publish and post its schedule of rates wherein and whereby it adopted, published and posted a th-ough rate
30 providing for the transportation and carrying of such freight, to wit; cotton seed in bulk, in car load quantities, subject to the minimum weight of 24,000 pounds to the car, from Moreauville and Cottonport, -ouisiana to Cisco, Texas; that said schedule of rates were promulgated, published and posted by it in accordance with the provisions of the interstate commerce law, and that at the time of the shipment of said cotton seed in plaintiff's first amended

original petition mentioned the through rate from Moreauville and Cottonport, Louisiana to Cisco, Texas, for the transportation of cotton seed in bulk of car load lots, subject to the minimum weight of 24,000 pounds to the car was 67 cents per hundred pounds; that at the time of the shipments in controversy the through rate published, adopted and posted by this defendant, in accordance with the provisions of the interstate commerce law, between Moreauville and Cottonport, Louisiana, and Cisco, Texas, for the transportation of cotton seed in bulk, between said points, subject to the minimum weight of 24,000 pounds to the car, was 67 cents per hundred pounds; that this defendant having promulgated published and posted said schedule of rates, as aforesaid, in accordance with the provisions of the interstate commerce law, and said schedule of rate so promulgated, published and posted by it having provided and established the rate of 67 cents per hundred pounds for the transportation of cotton seed in car load lots from Moreauville and Cottonport, Louisiana, to Cisco, Texas, subject to the minimum weight of 24,000 pounds to the car, at the time the shipment in plaintiff's first amended original petition were made, this defendant was not authorized and could not in accordance with law legally have demanded or collected
31 from plaintiff a lesser or greater rate for the transportation of said cotton seed from Moreauville and Cottonport, Louisiana, to Cisco, Texas, than the sum of 67 cents, as was so provided in the schedule of rates promulgated, published and posted by this defendant in accordance with the terms and provisions of the interstate commerce law of the United States of America, as aforesaid. This defendant further avers, alleges and charges that it did promulgate, publish and post its schedule of rate, in accordance with the provisions of the interstate commerce law of America, as aforesaid, prior to the time of the shipments being made as alleged in plaintiff's first amended original petition; that at the time said shipments were made, as alleged by plaintiff, said schedule of rates promulgated, published and posted by this defendant, as aforesaid, was in full force and effect, and that by the terms and provisions of said schedule of rates so promulgated, published and posted by this defendant, as aforesaid, it was provided that for the transportation of cotton seed between the town of Moreauville and Cottonport, Louisiana and Cisco, Texas, in car load lots, subject to the minimum weight of 24,000 pounds, to the car, should be and was subject to the charge of 67 cents per hundred pounds for the transportation of such seed from and to said points; that under and by virtue of the provisions of said schedule of rates so published, adopted and promulgated by this defendant, as aforesaid, this defendant was authorized and entitled to charge for the transportation of cotton seed in car load lots, subject to the minimum weight of 24,000 pounds, from Moreauville and Cottonport, Louisiana, to Cisco, Texas, the sum of 67 cents for each hundred pounds of such cotton seed so transported; that at the time of the shipment of said cotton seed,
32 as alleged in plaintiff's first amended original petition, and under and by virtue of the provisions and terms of said schedule of rates so promulgated, published and posted by this de-

fendant, as aforesaid, in accordance with the terms and provisions of the interstate commerce law, this defendant could not legally have charged, demanded or collected from plaintiff a greater or less rate for the transportation of said cotton seed in plaintiff's first amended original petition, as alleged, from the town of Morcauville and Cottonport, Louisiana, to Cisco, Texas, in car load lots, subject to the minimum weight of 24,000 pounds, in each car, than 67 cents for each hundred pounds of said seed so transported from Morcauville and Cottonport, Louisiana, to Cisco, Texas, by this defendant, as alleged by plaintiff.

Having answered in full, this defendant asks that it go hence without day, and recover judgment against plaintiff for its costs in this behalf incurred.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

6 1/2. For further special exception herein defendant excepts to all that part of plaintiff's first amended original petition wherein plaintiff seeks to recover, as a part of its damages in this cause the sum of $250.00 Attorney's fees; says that same are insufficient in law; because, in law this defendant is not liable for nor is plaintiff entitled to receive such sum or any other amounts as attorney's fees, as damages on the trial hereof; and of the sufficiency thereof, defendant prays judgment of the court.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'y- for Def't T. & P. Ry. Co.

33 (Endorsed:) No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Original Answer of Defendant. Filed Feb'y 19th, 1904. R. L. Davenport, Clerk Dist. Court, Eastland Co., Texas. B. G. Bidwell & H. C. Shropshire, Att'ys for T. & P. Ry. Co. Def't.

Pl'ff's First Supplemental Petition.

Filed 2/19/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

In the District Court of Eastland County, Texas, Jan. Term, 1904.

Now comes plaintiff, leave of the court being first had, and by way of replication to defendant's original answer herein filed, says:—

1. Plaintiff excepts to defendant's plea in abatement and plea to the jurisdiction of the court, and says the same is insufficient in law, and shows no reason why the suit should be abated; nor why

this court has no jurisdiction of the subject matters of this suit; and of this plaintiff prays judgment of the court.

2nd. Plaintiff specially excepts to so much of defendant's special answer, as alleges in substance and effect, that defendant could not have legally charged and demanded of and from plaintiff a
34 freight rate of greater or less that 67 cents per 100 pounds on the shipments of cotton seed mentioned and referred to in plaintiff's petition, because the same is an allegation of a conclusion of law and not a matter of fact.

3rd. And for further answer herein plaintiff denies all and singular the allegations made and contained in defendant's said answer, and of this etc.

J. J. BUTTS,
Att'y for Pl'ff.

(Endorsed:) No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's First Supplemental Petition. Filed Feb'y 19th, 1904. R. L. Davenport, Clerk Dist. Court, Eastland Co., Texas.

Judgment.

No. 1458.

CISCO OIL MILL
vs.
T. & P. RY. CO.

FEBRUARY 20, 1904.

This day this cause coming on to be heard and the plaintiff and defendant having appeared in person and by their respective attorneys of record, whereupon came on to be heard the pleadings of the parties, both plaintiff and defendants, and the court having heard the plea in abatement argued by defendant to the right of plaintiff to further prosecute this suit in and before this court, read; and said plea in abatement and the argument of counsel being fully
35 understood by the court and the court being of the opinion that in this respect the law is with the plaintiff and against the defendant.

It is further considered, ordered and adjudged by the court that said plea in abatement so urged by defendant and against plaintiff's cause of action, be and the same is hereby in all things overruled, to which action of the court in overruling said plea in abatement, the defendant at the time in open court excepted and gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth.

At the same time further coming on to be heard the general exceptions and special exceptions Nos. 3, 4, 5, and 6 urged by defendant to the first amended original petition filed herein by plaintiff; and each and all of said general and special exceptions being read to the court, and the argument of counsel thereon being heard and fully understood by the court; and the court being of the opinion

that as to each and all of said exceptions the law is with the plaintiff and against the defendant. It is therefore here now considered, ordered and adjudged by the court that each and all of said general and special exceptions be and the same are in all things overruled to which action of the court the defendant at the time excepted in open court and gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas at Fort Worth.

At the same time further coming on to be heard the special exceptions No. 6½ urged by defendant against plaintiff's first amended original petition, and said exception being read in the hearing of the court and said exceptions and the arguments thereon
36 being fully understood by the court, and the court being of the opinion that as to said special exceptions No. 6½ the law is with the defendant and against the plaintiff; it is therefore here now ordered, considered and adjudged by the court that said special exception be and the same is in all things by the court sustained.

At the same time whereupon this cause coming on for trial, and a jury being waived, and the matters in controversy, as well as of fact, as of law being submitted to the court; and the evidence and the argument of counsel being heard and fully understood by the court; and it appearing to the court from the evidence introduced upon the trial of this cause that, as to the matters in controversy herein, the law is with the defendant and against the plaintiff.

It is therefore considered, ordered and adjudged by the court that the defendant, the Texas & Pacific Railway Company, a railway corporation, go hence without day, and that the defendant, the Texas & Pacific Railway Company, railway corporation, have and recover judgment of, from and against the plaintiff, the Cisco Oil Mill, a private corporation, for and in the full sum of all costs in this behalf incurred; for which let execution issue within the terms of law, to which judgment the plaintiff, the Cisco Oil Mill, in open court at the time excepted, and gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth.

Pl'ff's Motion for a New Trial.

Filed 2/22/04.

In the Dist. Court of Eastland County, Texas, Jan'y Term, 1904.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Now comes the plaintiff and moves and prays the court
36*a* to set aside the judgment heretofore rendered in the above numbered and styled cause, for this:—

(1) The court erred in rendering judgment against, and not for the plaintiff, because the facts given in evidence shows that the

freight rate, and sum, charged and demanded of and from the plaintiff, was excessive, unjust and unreasonable.

(2) The court erred in rendering judgment against, and not for plaintiff; because the facts given in evidence shows and proves, that plaintiff in making the shipments complained of relied upon the statements and declarations of defendant as to what the rate of freight would be and that had defendant known that the freight rate on the cotton seed would be 67 cents per hundred pounds, it, plaintiff, would not have shipped same over defendant's railway.

Wherefore plaintiff prays that the judgment herein rendered be set aside and a new trial granted.

J. J. BUTTS,
Att'y for Plaintiff.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Motion for a New Trial. Filed Feb'y 22nd 1904. R. L. Davenport, Clerk Dist. Court Eastland Co. Texas.

37 *Pl'ff's Amended Motion for a New Trial.*

Filed 2/27/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RAILWAY CO.

Suit Pending in the District Court of Eastland County, Texas, January Term 1904.

Now comes the Cisco Oil Mill, plaintiff in the above numbered and styled cause and files this, its amended motion for a new trial herein, and moves and prays the court to set aside the judgment rendered herein on a former day of this term of court, to wit;—On February 20th, 1904, and to grant and award plaintiff a new trial herein; and for cause why said judgment should be set aside and a new trial granted, plaintiff respectfully shows to the court that it erred in the trial of said cause and in rendering judgment against plaintiff and in favor of defendant, in this;

First: The court erred in permitting defendant, over the objection of plaintiff, to read in evidence the following portion of the answer of the witness E. L. Sargent to cross interrogatory No. 1, propounded to him by defendant: "At the time these shipments were made the legal tariff rate from all these points mentioned, except Alexandria, La. was "Class A," or sixty seven cents per 100 pounds," as appears from plaintiff's bill of exception No. 1.

Second: The court erred in permitting defendant, over the objection of plaintiff, to read in evidence the following portion of the answer of the witness E. L. Sargent to cross interrogatory No. 2, propounded to him by defendant; "There was a published interstate

rate between all these points and Cisco, Texas," as appears from plaintiff's bill of exception No. 2.

Third: The court erred in permitting the defendant, over the objection of plaintiff, to read in evidence the answer of the
38 witness E. L. Sargent to cross interrogatory No. 3, propounded to him by defendant, said answer being as follows: "The through rate from Cottonport, Moreauville and Melville, La., to Cisco, Texas, at the times these shipments moved, as per legal tariff filed with the interstate commerce commission, was sixty seven cents per 100 pounds, on cotton seed in car load lots, subject to the minimum weight of 24,000 pounds per car, as above stated," as shown by plaintiff's bill of exception No. 3.

Fourth: The court erred in permitting defendant, over the objection of the plaintiff, to read in evidence the following portion of the answer of the witness H. L. Redfield to cross interrogatory No. 1, propounded to him by defendant, to be read in evidence: "The legal tariff rate published and filed with the Interstate Commerce Commission at Washington, D. C. on cotton seed in car loads, minimum weight of 24,000 pounds to the car from Cottonport, Moreauville and Melville to Cisco, was sixty seven cents per 100 pounds," as appears from plaintiff's bill of exception No. 4.

Fifth: The court erred in permitting defendant, over the objection of plaintiff, to read in evidence the following portion of the answer of the witness H. L. Redfield to cross interrogatory No. 2 propounded to him by defendant: "There was also a published through rate of sixty seven cents per 100 pounds on cotton seed in car loads, minimum weight of 24,000 pounds per car from Cottonport, Moreauville and Melville to Cisco, Texas, and which was the only tariff in effect at that time applying to through shipments from Cottonport, Moreauville and Melville to Cisco; the said tariff was a legal issue and filed with the interstate commerce commis-
39 sion at Washington, as above stated" as appears from plaintiff's bill of exception No. 5.

Sixth: The court erred in permitting defendant, over the objection of plaintiff to read in evidence the answer of the witness H. L. Redfield to cross interrogatory No. 3, propounded to him by defendant; said answer being as follows: "The 67 cent rate, specified above, was the regular tariff Class A', which was the classification of cotton seed in car loads, and it would have been illegal for the railway company to have transcen-ed the said published through tariff rate by attempting to apply the Louisiana railroad commission rate from Cottonport, Moreauville and Melville to Alexandria, combined with the commodity rate of 20 cents per 100 pounds on cotton seed in car loads from Alexandria to Cisco, the interstate commerce law providing that published through rates of railroad companies shall be assessed in all cases; this, regardless of the fact that certain combinations of local commodity rates otherwise might be used for the purpose of cutting the legally established through rate," as appears from plaintiff's bill of exception No. 6.

Seventh: The court erred in permitting the defendant, over the objection of the plaintiff, to read in evidence the answer of the wit-

ness R. Fenby, to cross interrogatory No. 1 propounded to him by defendant, as appears from plaintiff's bill of exception No. 7.

Eighth: The court erred in permitting the defendant, over the objection of the plaintiff, to read in evidence the answer of the witness R. Fenby to cross interrogatory No. 2 as appears from plaintiff's bill of exception No. 8.

Ninth: The court erred in permitting the witness Maxwell to testify in behalf of defendant, and over the objection of
40 plaintiff, to the fact that the tariff schedule offered and admitted in evidence, had been duly published as required by interstate commerce act, as appears from Plaintiff's bill of exception No. 9.

Tenth: The court erred in its finding of facts, as set out in the sixth paragraph thereof, in finding and concluding that the books containing the freight rates and classifications of freight, on file in the office of defendant at Cisco, Texas, constituted the then published rate of freights and tariffs then in force on defendant's line of railway, and that said books, with the tables and schedules therein, contained the schedules rates etc. required by the interstate commerce acts to be filed with the interstate commerce commission," because it appears from the evidence that the freight agent of defendant at Cisco, Texas, though he had been in the employment of defendant for 15 years, could not tell from an inspection and examination of such schedules and tariffs, what the freight rate would be on cotton seed in car load lots, from the points of shipment to Cisco, and it did not appear that said schedule had been posted as required by law.

Eleventh: The court erred in its first conclusion of law, in concluding and holding that the freight rates on the shipments complained of by plaintiff, were controlled and governed by the interstate commerce act of Congress of the United States, because it does not appear from the evidence that any freight rate of cotton seed, between the points of shipments, had been promulgated and established by the defendant in accordance with the terms and provisions of the interstate commerce act.

Twelfth: The court erred in its second conclusion of law, in concluding and holding, "That, by the filing of the schedules freight rates and the classifications of freights referred to in sec-
41 tion 5 of the findings of facts, and furnishing copies of the same to the freight office at Cisco, and sending same to the other freight offices, that the cotton seed so shipped by "defendant" (plaintiff) was subject to the tariffs rates of 67 cents per 100 pounds under the provisions of the interstate commerce act," because it does not appear that said freight rate of 67 cents per 100 pounds between the points of shipments were ever legally established, or that any other freight on cotton seed, between the points of shipment, was ever legally established, or effective at the time of said shipments, it not appearing that the provisions of the interstate commerce act had been complied with by defendant in respect to publishing and posting the tariffs and schedules.

Thirteenth: The court erred in its third conclusion of law, in con-

cluding and holding that, notwithstanding 30 cents per 100 pounds, would have been a reasonable freight charge, and that the charge of 67 cents per 100 pounds was unreasonable and excessive, the defendant, under the terms of the interstate commerce act, and the printed schedule filed could not have legally charged any other than 67 cents per 100 pounds; because it does not appear from the evidence that the rate of 67 cents per 100 pounds had been legally established, in that the evidence adduced on the trial of the cause shows that the schedules of freight rates and classifications printed by the defendant, and filed at the Cisco office, was so obscure that its own freight agent who had been in its service as such for 15 years could not tell what the freight rate was on cotton seed between the points of shipment, and because further, it does not appear from the evidence that such schedules and tariffs had been
42 posted by defendant as required by law.

Fourteenth: The court erred in its fourth conclusion of law, in concluding and holding that the plaintiff was *con*cluded from a recovery herein by the terms and provisions of the interstate commerce act of the United States Congress, and its schedules of rates then filed with the interstate commerce commission, because it does not appear from the facts adduced in evidence, that any freight rate between the points of shipment had been established by the defendant, covering cotton seed in car load lots, under the provisions of the interstate commerce act.

Fifteenth: The court erred in rendering judgment against, and not in favor of plaintiffs, for this, the facts given in evidence show: (1) That a freight rate, or charge, of 30 cents per hundred pounds would have been a reasonable rate and charge for transporting plaintiff's cotton seed.

(2) That a freight rate of 67 cents, which was charged and demanded of, and received from plaintiff, was excessive and unreasonable; that freight rate at this rate was required of plaintiff before he could get possession of its cotton seed, and that it was paid under protest.

(3) It was not proven, and does not appear from the facts given in evidence that at the time of the shipments complained of there was in effect on defendant's railway a legally established freight rate between the points of shipment, on cotton seed in car load lots, which exceed- 30 cents per hundred pounds.

Sixteenth: The court erred in rendering judgment against, and not for, plaintiff, because the facts given in evidence showed:

(1) That prior to the shipments complained of, plaintiff called upon the defendant's freight agent at Cisco, Texas, *the* re-
43 quested and demanded the privileges of inspecting and examining the printed tariffs and schedules by defendant showing the freight rate on cotton seed in car load lots, over its railway from points in Louisiana not exceeding 50 miles east of Alexandria to Cisco; the defendant's freight agent then told plaintiff that he had no such schedules in his office or freight depot; that plaintiff could not find any posted in the freight depot or freight office; and that no such schedules were, in fact, posted in said depot or office; that

defendant's said freight agent told plaintiff that, he, said agent, had no such tariffs; that plaintiff then asked defendant's freight agent what the freight rate would be, and said agent told and informed plaintiff that he, said agent, did not know exactly, but that the freigh rate from points not exceeding 50 miles east of Alexandria would be something less than the sum of the local rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco; that subsequently to this, and prior to any or either of the shipments, plaintiff again called upon defendant's said freight agent at Cisco, and inquired about the freight rate of cotton seed from points on defendant's railway in Louisiana not exceeding 50 miles east of Alexandria to Cisco; but at this time he could find no printed schedule or tariff posted in defendant's freight depot or freight office showing what such freight rate would be; and defendant's freight agent again told plaintiff that he, said agent, had no such printed tariff or schedule and that he did not know what the freight rate would be, but that it would be something less than the rate from point of shipment to Alexandria plus the rate from Alexandria to Cisco; and that the said agent of defendant, could not,
44 from the information in his office tell what such freight rates would be; but said it would not exceed the sum of the rate to Alexandria plus the rate from Alexandria to Cisco.

(2) That plaintiff knew, at the time the agent of the defendant gave him the information above stated in reference to freight rates, that the rate from Alexandria to Cisco was 20 cents per hundred pounds on cotton seed in car loads, and then believed that the rate from points of shipment to Alexandria would not exceed ten cents per 100 pounds.

(3) That the freight then charged by defendant over its railway on cotton seed in car loads from Alexandria to Cisco was 20 cents per 100 pounds, and from Cottonport and Moreauville, the points of shipments, the rate was 10 cents per 100 pounds, making the sum of the two rates 30 cents per 100 pounds.

(4) That in purchasing the four cars of cotton seed shipped over defendant's railway, plaintiff relied upon the statement of defendant's agent to the effect that the through rate from Cottonport and Moreauville to Cisco would not exceed the sum of the rate from points of shipment to Alexandria, plus the rate from Alexandria to Cisco; and that, had plaintiff known that the freight rate on the shipments would have exceeded 30 cents per 100 pounds it would have not purchased or shipped said cars of cotton seed, or any or either of them.

(5) It was not proven, and does not appear from the evidence introduced, that there was, at the time of said shipments, a legally effective freight rate on cotton seed in car loads over defendant's railway, between the points of shipment, which exceeded 30 cents per 100 pounds.

45 (6) The facts proven in evidence show that defendant is estopped to charge or demand of plaintiff more than 30 cents per 100 pounds for carrying and transporting said four cars of cotton seed.

Seventeenth: The judgment is contrary to, and not supported by the law or the facts because it appears:

That 30 cents per hundred pounds would have been a reasonable charge and compensation for carrying and transporting the four cars of cotton seed; that 67 cents, which plaintiff was required to —, under protest, was an unreasonable freight thereon; that there was no legal interstate rate in excess of 30 cents per 100 pounds between the points of shipment; that defendant's agent told plaintiff the rate would not exceed the sum of the rate from points of shipment to Alexandria plus the rate from Alexandria to Cisco; that plaintiff relied upon this statement; that had it known that the freight rate would have exceeded 30 cents per hundred pounds it would have not purchased or shipped said cotton seed; that the sum of the two rates did not exceed thirty cents per 100 pounds that the schedules showing the freight rate to be 67 cents per 100 pounds had not been printed and posted as required by law in order to make the same effective, and under the law defendant could not have legally charged more than a reasonable rate of freight, which was 30 cents per 100 pounds, as was estopped, under the facts to charge more than 30 cents per 100 pounds freight on said shipments.

Wherefore plaintiff moves and prays the court to set aside the judgment herein rendered against it, and to grant it a new trial.

J. J. BUTTS,
Attorney for Defendant.

46 No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry Co. Plaintiff's Amended Motion for a New Trial. Filed Feb'y 27th 1904. R. L. Davenport, Clerk Dist. Court Eastland Co. Texas.

Judgment Overruling Amended Motion for New Trial.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

FEB'Y 27TH, 1904.

On this day came on to be heard plaintiff's motion for a new trial in the above numbered and styled cause, and both parties appeared by their respective counsel; and the court having heard the argument of counsel, and being fully advised in the premises; and because the court being of the opinion that there is no error in the judgment heretofore rendered in said cause and that said motion should be overruled.

It is therefore considered, ordered and adjudged by the court that the said motion be, and the same is hereby overruled.

It is further considered, ordered and adjudged that the defendant do have and recover of and from the plaintiff all costs incurred by

reason of said motion, to which said judgment overruling
47 said motion plaintiff in open court excepts, and gives notice of appeal to the court of civil appeals of the second supreme judicial district of Texas, at Fort Worth.

It is therefore ordered that the parties hereto have twenty days within which to prepare in said cause, a statement of facts, and bills of exceptions in said cause.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Railway Co. Judgment on Motion for New Trial. Filed Feb'y 27th. R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Findings of Fact and Conclusions of Law.

Filed 2/27/04.

No. 1458.

Cisco Oil Mill
vs.
Texas & Pacific Ry. Co.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Findings of Facts and Conclusion of Law, as Found and Determined by the Court on the trial of the Above Numbered and Styled Cause.

Findings of Facts.

From the evidence introduced on the trial of said cause, the court finds the following facts to have been established.

1. That the town- of Cisco and El Paso, in the state of Texas, and Alexandria, Melville, Moreauville and Cottonport, in the state of Louisiana, are stations on the line of defendant's railway;
48 and that, at the several times and dates mentioned and referred to in plaintiff's petition, and at the time of the several shipments complained of, defendant operated a line of railway between each of said stations; that Cottonport is 40 4/10 miles east of Alexandria, that Moreauville is 48 3/10 miles east of Alexandria; Melville 65 9/10 miles east of Alexandria and 514 miles east of Cisco, and 1013 miles east of El Paso; that Alexandria is 449½ miles east of Cisco and 947 8/10 miles east of El Paso; That Alexandria is a station on defendant's railway intermediate between the towns of Cottonport and Moreauville and the town of Cisco, and that Cisco is a station of defendant's railway intermediate between the towns of Alexandria and Melville, Louisiana and the town of El Paso, and that a shipment of freight from the towns of Cottonport and Moreauville to Cisco, over defendant's railway, would pass through Alexandria.

2. That, at the time of the several shipments of cotton seed hereinafter referred to, the freight rate on cotton seed in car load lots, in bulk, over defendant's railway, according to the freight tariffs promulgated by the defendant, from Melville and Alexandria to El Paso was 35 cents per 100 pounds; from Alexandria to Cisco 20 cents per 100 pounds, and from Cottonport and Moreauville to Alexandria 10 cents per 100 pounds, cars to contain not less that 40,000 pounds of cotton seed.

3. That the plaintiff shipped three car loads of cotton seed, in bulk, from Moreauville, Louisiana, to Cisco, on the 20th and 26th and 28th day- of Sept. 1901, weighing respectively 40,090, pounds, 44,610 pounds, and 40,530 pounds, and on the 25th day of September 1901, shipped one car of cotton seed from Cottonport,
49 La., to Cisco, weighing 48,200 pounds; that upon the delivery of said four car loads of cotton seed to defendant the defendant executed its certain four bills of lading therefor acknowledging the receipt thereof, and undertaking and agreeing to transport and carry the same to Cisco; but that no freight rate was named or specified in any of said bills of lading, nor did the plaintiff's agent make an inquiry at Cottonport or Moreauville as to what the freight rates to Cisco would be.

4th. That some three weeks prior to the purchase and shipping of said cotton seed, the business manager of plaintiff (P. W. Reynolds) called upon the freight agent of the defendant at Cisco and requested information as to the rates on Cotton seed in bulk, in car load lots, from stations in Louisiana not more than 50 miles east of Alexandria to Cisco; that said agent at Cisco looked through some printed tariffs schedules but failed to find the rate on bulk cotton seed, as requested, and told plaintiff's agent that he couldn't find it and they said they didn't have it.

He had some data showing rates from Alexandria to Cisco and from Melville to Cisco, but did not have any rate from Cottonport and Moreauville, and plaintiff's agent asked him to procure the information from the main office at Dallas, Texas. At the same time the defendant's agent told the plaintiff's agent that he did not know exactly what the rate would be from those points near to and east of Alexandria, but that it would be something more than the rate from Alexandria to Cisco and something less than the rate from Alexandria to Cisco plus the local rate to Alexandria from shipping point further east, and that he did not know exactly. About two
50 weeks subsequent to the aforesaid interview, the plaintiff's agent again visited and interviewed the defendant's agent at Cisco as to said freight rates on cotton seed with substantially the same results as before.

5th. That there was at the time of both of the aforesaid interviews in the office and possession of the defendant's agent at Cisco a book of tariff rates showing the freight rates to Cisco from the aforesaid points and all other points on said road in La. and showing that the freight tariff from Cottonport and Moreauville to Cisco on freight known as "Class A" was 67 cents per hundred pounds, in car load lots, of not less than forty thousand pounds. Said book referred to

a book of the classifications of freights compiled by the western classification association for information as to how freight was classed, and said book so compiled by the western classification association was also on file in the office of the defendant's agent at Cisco, the said book of classifications showed the cotton seed was listed as "class A."

That said agent of the defendant at Cisco had been in the service of the defendant as its station agent at Cisco about 15 years, but in looking for said tariff rate he gave his attention entirely to looking for a commodity rate on cotton seed from points in La. to Cisco and failed to look for it under the head of classified freights, and therefore failed to find it and give the information desired.

6th. That the books containing the freight rates and classifications of freights described in the 5th paragraph above constituted, the then published rate of freights and tariffs then in force on the defendant's line of railway and the same were on file with the interstate
51 commerce commission of the United States, and copies of the same had been forwarded by the general offices of the defendant railroad company to all of its freight agents and freight depots on its line of railroad. That said books with the tables and schedules therein constituted the schedules, rates, etc. required by the interstate commerce acts to be filed with the interstate commerce commission. No evidence, however, was offered as to whether or not said books of freight rates and classifications were or were not actually on file at Cottonport and Moreauville and the court makes no finding as to that fact.

7th. That the plaintiff's manager knew that the freight rates on cotton seed, in bulk, in car loads, from Alexandria to Cisco was 20 cents per hundred pounds, while interviewing the defendant's agent at Cisco, but did not believe that the rates to Alexandria from points not exceeding 50 miles east thereof would exceed 10 cents per hundred pounds. That immediately after his second interview with the defendant's agent, as set forth in 4th paragraph above, the plaintiff's agent caused to be purchased the four car loads of cotton seed at Cottonport and Moreauville relying upon the statements made to its business manager, W. P. Reynolds, by the defendant's freight agent to the effect that the freight rates from Cottonport and Moreauville to Cisco would not exceed the sum of the rates from Cottonport and Moreauville to Alexandria, which I find was 10 cents per hundred pounds, plus the rate from Alexandria to Cisco, which I find was 20 cents per 100 pounds, and that — plaintiff had known or had any reason to believe that the freight rates on said cotton seed would have exceeded 30 cents per hundred pounds; plaintiff would have not purchased or shipped the same.

52 8th. That when said four cars of cotton seed arrived at Cisco, defendant demanded of the plaintiff freight charges thereon at the rate of 67 cents per hundred pounds, and compelled the plaintiff to pay the same before it, defendant, would deliver said cotton seed to plaintiff, and that in order to get possession of its cotton seed plaintiff was compelled and did pay defendant freight thereon at the rate of sixty seven per hundred pounds, which

amounted to the sum of $1161.98, which said sum, plaintiff paid to defendant under protest; that the freight charges on said four cars of cotton seed at the rate of 30 cents per hundred pounds, would have amounted to $520.29, that sixty seven cents per hundred pounds for said freight was excessive and unreasonable. That 30 cents per hundred pounds, was a reasonable charge for freight rate on cotton seed in bulk, in car load lots, of exceeding 40,000 pounds from Cottonport and Moreauville to Cisco, Texas, at the time of these several shipments.

Conclusions of Law.

From the foregoing facts, I conclude as a matter of law,

First: That the several shipments of cotton seed referred to in plaintiff's petition were interstate shipments, and that the freight rates and freight charges thereon are governed and controlled by the interstate commerce act of the congress of the United States.

Second. That by the filing of the schedule of freight rates and classifications of freights referred to in section No. 5 of the findings of fact, and furnishing copies of the same to the freight office at Cisco, and sending the same to the other freight offices, that the cotton seed so shipped by defendant was subject to the tariff
53 rates of 67 cents per hundred pounds under the provisions of the interstate commerce act.

Third. That thirty cents per hundred pounds would have been a reasonable freight rate on such shipments of cotton seed and the charge of 67 cents per hundred pounds was excessive and unreasonable, but under the terms of the interstate law and the printed schedule filed, the defendant could not have charged lawfully any other rate than 67 cents per hundred pounds.

Fourth. The plaintiff is precluded from a recovery herein by the terms and provisions of the interstate act of the United States Congress, and its schedules of the rates then filed with the interstate commerce commission.

J. H. CALHOUN,
Judge 42nd Judicial Dist. of Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Findings of Facts and Conclusions of Law. Filed Feb'y 27th, 1904. R. L. Davenport, Clerk District Court, Eastland Co., Texas.

Appeal Bond.

Filed 3/11/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Whereas, in the above numbered and entitled cause, pend-
54 ing in the district court of Eastland county, Texas, at a regular terms thereof, to wit;—On the 29th day of February, A. D. 1904, the said defendant, Texas & Pacific Railway Company recovered a judgment against the plaintiff, Cisco Oil Mill, for all costs incurred by defendant in said cause, and that defendant go hence without day; from judgment the said Cisco Oil Mill has taken an appeal to the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth.

Now, therefore, we, Cisco Oil Mill, as principal, and P. W. Reynolds and J. B. Spears, as sureties, acknowledge ourselves bound to pay to Texas & Pacific Railway Co. the sum of Two hundred dollars, conditioned that the said Cisco Oil Mill shall prosecute its appeal with effect, and shall pay all costs which have accrued in the court below, and which may accrue in the court of civil appeals and the supreme court.

Winess our hands, this the 10th day of March A. D. 1904,

CISCO OIL MILL.
J. B. SPEARS.
R. W. REYNOLDS.

I have fixed the probable amount of the costs of the suit, both in the court below and in the court of civil appeals and supreme court at $100.00 and approve the foregoing bond on this 11th day of March, A. D. 1904.

R. L. DAVENPORT,
Clerk District Court, Eastland County, Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Railway
55 Company. Appeal Bond. Filed Mar. 11th, 1904. R. L. Davenport, Clerk Dist. Court Eastland Co., Texas.

Pl'ff's Bill of Exception No. 1.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term 1904.

Be it remembered that on the trial of the above numbered and styled cause, the following proceedings were had, to wit:

Defendant offered to read in evidence the answer of E. L. Sargent, a witness for the plaintiff, to the first cross interrogatory propounded to him by defendant; whereupon, the plaintiff objected to the reading in evidence of the following part of said answer, viz: "At the time these shipments were made the legal tariff from all these points, except Alexandria, La., was class A sixty seven cents per 100 pounds, because,

(1) It was secondary evidence.

(2) It was hearsay evidence, and

(3) The same was a mere statement of a legal conclusion of the witness, and not a statement of a matter of fact;

Which said objections the court overruled and permitted defendant to read said part of said answer in evidence, to which said ruling of the court, and to the admission of said testimony, the plaintiff then and there duly excepted, and now here tenders this, his bill of exception, and prays that the same be examined, approved and
56 signed by the court, and ordered to be filed herein as a part of the record in this cause.

This the 5th day of March, 1904.

J. J. BUTTS,
Attorney for Pl'ff.

Presented and agreed to be

____ ____,
Att'ys for Def't.

This bill of exception examined, found correct and approved and signed and ordered filed as a part of the record in this cause, this *is* the 11th day of March A. D. 1904.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 1. Filed March 5th, 1904. R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Pl'ff's Bill of Exception No. 2.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RAILWAY CO.

Suit Pending in the District Court, Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and styled cause, the following proceedings were had to wit:—

57 Defendant offered to read in evidence the answer of E. L. Sargent, a witness for the plaintiff, to the 2nd cross interrogatory propounded to him by defendant; whereupon, plaintiff objected to the reading in evidence of the following part of said answer, viz: "There was a publishes interstate rate between all these points and Cisco, Texas," because,

1. It was secondary evidence;
2. It was hearsay evidence, and
3. It was a statement of a mere conclusion of the witness, and not a statement of a matter of fact, or facts,

Which said objections the court overruled and permitted defendant to read and introduce said part of said answer in evidence; to which said ruling of the court, and to the admission of said evidence, plaintiff duly excepted, and now here tenders this its bill of exception and prays that the same be examined, approved and signed by the court, and ordered to be filed herein and made a part of the record in this cause.

This the 5th day of March 1904.

J. J. BUTTS,
Attorney for Plaintiff.

Presented and agreed to by

—— ——,
Attorney for Defendant.

This bill of exception examined, found correct, approved and signed and ordered filed as a part of the record in this cause, on this the 5th day of March A. D. 1904.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

58 No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Pl'ff's Bill of Exception No. 2. Filed March 5th 1904. R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Pl'ff's Third Bill of Exception.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that in the trial of the above numbered and styled cause the following proceedings were had to wit:

Defendant offered in evidence the answer of E. L. Sargent a witness for the plaintiff, to the 3rd cross interrogatory propounded to him by defendant, which is as follows, viz: "The through rate from Cottonport, Moreauville and Melville, La. to Cisco, Texas, at the time these shipments moved, as per legal tariff filed with the Interstate Commerce Commission, was sixty seven cents per 100 pounds, on cotton seed in car loads, subject to the minimum weight 24,000 pounds per car, as above stated;" to the introduction in evidence of which said answer plaintiff duly objected because,

1. It was secondary evidence;
2. It was hearsay evidence, and
3. It was the statement of a mere legal conclusion of the witness, and not a statement of a matter, or matters of fact.

Which said objections the court overruled and permitted defendant to read and introduce said answer in evidence; which said ruling of the court, and to the admission of said answer in evidence, plaintiff excepted and now here tenders this, its bill of exceptions,
59 and prays that the same be examined, approved and signed by the court, and ordered filed herein as a part of the record in this cause. March 5th, 1904.

J. J. BUTTS,
Att'y for Plaintiff.

Presented and agreed to by

——— ———,
Attorneys for Defendant.

This bill of exception examined, found correct, and approved and signed and ordered filed as a part of the record in this cause, this *is* the 5th day of March A. D. 1904.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry Co. Plaintiff's Bill of Exception No. Three. Filed March 5th 1904. R. L. Davenport, Dist. Clerk Eastland County, Texas.

Pl'ff's Bill of Exception No. 4.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and st*u*led cause the following proceedings were had, to wit:

Defendant offered to read and introduce in evidence the
60 answer of H. L. Redfield, a witness for the plaintiff to cross interrogatory No. 1, propounded to him by defendant, whereupon, plaintiff objected to the reading and introducing the following portion of said answer in evidence, viz:

"The legal tariff rate published and filed with the interstate commerce commission, at Washington, D. C. on cotton seed in car loads, minimum weight 24,000 pounds per car, from Cottonport, Moreauville and Melville to Cisco, was sixty seven cents per hundred pounds; because,

1. The same was secondary evidence;
2. It was hearsay evidence, and
3. It was a statement of a legal conclusion of the witness, and not a statement of a matter, or matters of fact.

Which said objections the court overruled and permitted defendant to read and introduce said part of said answer in evidence, to which said ruling and to the admission of said evidence, plaintiff excepted, and now here tenders this, its bill of exceptions, and prays the same be examined, approved and signed and ordered filed herein as a part of the record in this cause.

This the 5th day of March 1904.

J. J. BUTTS,
Att'y for Plaintiff.

Presented and agreed to by

——— ———,
Attorney for Defendant.

This bill of exception examined, found correct, approved and signed, and ordered filed as a part of the record in this cause, this the 5th day of March 1904.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

61 No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 4. Filed March 5th, 1904. R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Pl'ff's Bill of Exception No. 5.

Filed 2/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and styled cause, the following proceedings were had, to wit:

Defendant offered to read and introduce in evidence that part of the answer of H. L. Redfield, a witness for the plaintiff, to cross interrogatory No. 2 propounded to him by defendant as follows: "There was also a published through rate of sixty seven cents per hundred pounds on cotton seed in car loads, minimum weight 24,000 pounds per car, from Cottonport, Moreauville and Melville to Cisco; the said tariff was legal issue, and filed with the interstate commerce commission, at Washington as above stated," to the introduction of said part of said answer plaintiff objected; because,

1. It was secondary evidence,
2. It was hearsay evidence, and
3. It was a statement of a mere legal conclusion of the witness, and not a statement of matter, or matters of fact.

62 Which said objections the court overruled and permitted said part of said answer to be read and introduced in evidence; to which said ruling of the court, and to the admission of said evidence, plaintiff excepted and here now tenders this, his bill of exceptions, and prays that the same be examined, approved and ordered filed in this cause as a part of the record herein. This the 5th day of March A. D. 1904.

J. J. BUTTS,
Att'y for Plaintiff.

Presented and agreed to by,

——— ———,
Attorneys for Defendant.

This bill of exception examined, found correct and approved and signed and ordered filed as a part of the record in this cause, this the 5th day of March.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

No. 1458 Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 5. Filed March 5th 1904. R. L. Davenport, Clerk Dist. Court Eastland Co., Texas.

Pl'ff's Bill of Exception No. 6.

Filed 2/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904

63 Be it remembered that on the trial of the above numbered and styled cause, the following proceedings were had, to wit: Defendant offered to read and introduce in evidence the answer of H. L. Redfield, a witness for plaintiff, to cross interrogatory No. 3 propounded to him by defendant, which said answer is as follows, viz: "The 67 cents rate, specified above, was the regular class "A" which was the classification of cotton seed, in car load lots, and it would have been illegal for the railway to have transcended the said published through tariff rate by attempting to apply the Louisiana Railroad Commission rate from Cottonport, Moreauville and Melville to Alexandria, combined with the commodity rate of twenty cents per 100 pounds on cotton seed, in car load lots, from Alexandria to Cisco, the Interstate Commerce law provided that published through rate of railroad companies shall be assessed in all cases; this regardless of the fact that certain combinations of local commodity rates otherwise might be used for the purpose of cuttin- legally established through rates," to the introduction of which *the* said answer in evidence the plaintiff objected, because,

1. It was immaterial and irrelevant, and did not tend to prove any issue in this cause;
2. It was hearsay evidence,
3. It was secondary evidence, and
4. It was the statement of conclusions of law of the witness, and not a statement of a ma'ter, or matters of fact.

Which said objections the court overruled and permitted the defendant to read and introduce said answer in evidence; to which ruling of the court, and to the admission of said evidence,
64 plaintiff excepted, and now here tenders this, his bill of exceptions, and prays that the same be examined, approved and signed and ordered filed as a part of the record in this cause, this the 5th day of March 1904.

J. J. BUTTS,
Att'y for Plaintiff.

Examined, allowed, approved and ordered to be filed, this March 5th, 1904.

J. H. CALHOUN,
Judge Presiding.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 6. Filed March 5th 1904. R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Pl'ff's Bill of Exception No. 7.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and styled cause, the following proceedings were had, to wit:

Defendant offered in evidence the answer to R. Fenby, a witness for plaintiff, to cross interrogatory No. 1, propounded to him by defendant, said answer being as follows, viz: "As far as I am informed, the correct rate on shipments in question is 67 cents per 100
65 pounds, in accordance with our tariff No. JB-4270-H," to the introduction of which said answer in evidence plaintiff objected, because,

1. It was hearsay evidence;
2. It was secondary evidence;
3. It appearing from the witness's answer to the third cross interrogatory that he knew nothing, of his own knowledge, concerning the matters about which he was testifying, and
4. The answer was a statement of the mere conclusions of the witness, and not a statement of a matter of fact;

Which objections the court overruled and permitted defendant to read and introduce said answer in evidence; to which said ruling of the court, and to the admission of said testimony, plaintiff excepted, and now here tenders this, his bill of exception, and prays that the same be examined, approved and signed, and ordered filed as a part of the record in this cause, this the 5th day of March 1904.

J. J. BUTTS,
Att'y for Plaintiff.

Presented and agreed to by

____ ____,
Att'y for Defendant.

This bill of exception examined, found correct, approved, signed and ordered filed as a part of the record in this cause, on this the 5th day of March, A. D. 1904.

J. H. CALHOUN,
Judge 42nd Jud. District of Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co.
66 Plaintiff's Bill of Exception No. 7. Filed March 5th 1904.
R. L. Davenport, Clerk Dist. Court Eastland County, Texas.

Pl'ff's Bill of Exception No. 8.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and styled cause the following proceedings were had, to wit:

Defendant offered to read in evidence the answer of R. Fenby, a witness for plaintiff, to Cross interrogatory No. 2, propounded to him by defendant, which is as follows viz: "There was a published interstate rate between said points and Cisco of 67 cents per 100 pounds, as per our tariff No. JB-4270-I," to the introduction of which said answer plaintiff objected, because,

1. It was hearsay evidence;
2. It was secondary evidence;
3. It appeared from the witness' answer to the third cross interrogatory that he knew nothing, of his own knowledge, concerning the matters about which he was testifying; and,
4. The answer was a statement of a mere conclusion of the witness, and not a statement of a matter, or matters of fact.

Which said objections the court overruled and permitted defendant to read and introduce said answer in evidence, to which said ruling of the court, and to the admission of said evidence,
67 plaintiff excepted, and now here tenders this, its bill of exceptions and prays that the same be examined, approved, signed and ordered filed as a part of the record in this cause, this the 5th day of March 1904.

J. J. BUTTS,
Attorney for Pl'ff.

Presented and agreed *and agreed* to by
——— ———,
Attorney for Defendant.

This bill of exception examined, found correct, approved, signed and ordered filed as a part of the record in this cause, this the 5th day of March, A. D. 1904.

J. H. CALHOUN,
Judge 42nd Judicial District of Texas.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 8. Filed March 5th 1904. R. L. Davenport, Clerk District Court of Eastland County, Texas.

Pl'ff's Bill of Exception No. 9.

Filed 3/5/04.

No. 1458.

Cisco Oil Mill
vs.
Texas & Pacific Ry. Co.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered that on the trial of the above numbered and styled cause the following proceeding- were had, to-wit:

Defendant offered to prove by the witness G. S. Maxwell,
68 that the freight rate on cotton seed over defendant's railway as shown by the printed tariff introduced in evidence was effective at the time of the shipments complained of, and that there was no other freight rate on cotton seed and effective between the points of shipment at that time.

To the introduction of which evidence plaintiff objected; because,

1. It was immaterial and irrelevant and did not tend to establish any issue in the case.
2. The evidence was the statements of conclusions of the witness, and not statement of matters of fact.
3. It was secondary evidence.
4. It was hearsay evidence.
5. The evidence was the statement of conclusions of the witness on questions of law.
6. It had not been shown that the witness knew of his own knowledge that the said printed tariff had been properly posted and published.

Which exceptions the court overruled and permitted the witness to testify as follows:

"JB. 4278-H-I. C. C. # 202 (the one introduced in evidence) established the rate of 67 cents per hundred pounds, minimum 24,000 per car on cotton seed in car load lots, between Cottonport and Moreauville, La. and Cisco, Texas, which rate was in effect during the months of Sept. and Oct. 1901, at the time of the shipments involved in this suit. At the time of these shipments there was no through tariff rate on cotton seed between Cottonport and Moreauville, La. and Cisco, Texas, in existence at the rate of 67 cents per hundred pounds, which I have testified about."

69 To which ruling of the court and to the admission of said evidence plaintiff excepted, and now here tenders this his

bill of exception and prays that the same be examined, approved and signed and ordered filed as a part of the record in this cause. This the 5th day of March, 1904.

J. J. BUTTS,
Attorney for Pl'ff.

This bill of exception presented, examined, found correct, approved and ordered filed as a part of the record in this cause. This the 5th day of March 1904.

J. H. CALHOUN,
Judge 42 Jud. Dist., Presiding.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Bill of Exception No. 9. Filed March 5th 1904. R. L. Davenport, Clerk Dist. Court Eastland Co., Texas.

Statement of Facts.

Filed 3/5/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following facts were proven, to wit:

J. B. SPEARS, a witness for plaintiff, testified:

I live at Cisco, Texas. I am book-keeper for the Cisco Oil Mill, and have been such since the mill was started. I pay the
70 freight on all cotton seed shipped to the mill. I remember the circumstances of the Cisco Oil Mill receiving three car loads of cotton seed from Moreauville, and one car load from Cottonport last September or October; I was book-keeper for the oil mill at that time. (The witness was handed some papers which he identified as the freight bills covering the four cars in question) I paid the freight on the four cars of cotton seed; these bills give the correct amount I paid on each one of the cars; On one car I paid $271.55, on another $268.69, and on another $322.94; I know the nature of this suit; at first I was instructed by the manager of the oil mill not to pay the freight on the four cars of cotton seed at the rate of 67 cents per 100 pounds, but afterwards I was instructed to pay it; to that extent I know that freight was paid under protest; The freight was paid on the basis of the weights given in these expense bills; we reweighed the cars at Cisco, and the railway company accepted our weight. The cars weighed 48,200, 44,610, 40,090 and

40,530 pounds, respectively; I generally weight all of the cars that come to the oil mill, but I cannot be certain that I weighed these four cars; I paid the freight on these four cars at the rate of 67 cents per hundred pounds; these expense bills were given to me by the railway company after I paid the freight.

Plaintiff introduced in evidence expense bills covering the four cars in question; also the bills of lading covering the shipments in question, as follows:

Three bills of lading issued by defendant at Moreauville La. dated respectively, September 20th, 26th and 28th, 1901, and one issued by defendant at Cottonport La. Dated September 25th, 1901, each acknowledging the receipt of a car load of cotton
71 seed in bulk, to be carried and transported to Cisco, Texas, and there to be delivered to plaintiff. No freight on said cotton seed was named or specified in any or either of such bills of lading.

Four freight bills, or freight receipts were introduced in evidence by plaintiff as follows:

1. One dated Cisco, Texas, Sept. 28, 1901, acknowledging payment of freight charges on one car of cotton seed shipped from Moreauville, La. to Cisco, Texas, weight 40,530 pounds, rate 67 cents per 100 pounds, amount of freight charges paid $271.55.

2. One dated Cisco, Texas, Sept. 30, 1901, acknowledging payment of freight charges on one car of cotton seed shipped from Cottonport La. to Cisco, Texas, weight 48,200 pounds, rates 67 cents per 100 pounds, total amount freight charges paid $322.94.

3. One dated Cisco, Texas, October 2nd, 1901, acknowledging the payment of freight charges on one car of cotton seed shipped from Moreauville, La. to Cisco, Texas, weight 40,910 pounds, rate 67 cents per hundred pounds, total amount freight charges paid $268.60.

4. One dated Cisco, Texas, October 3rd, 1901, acknowledging payment of freight charge on car load of cotton seed shipped from Moreauville La. to Cisco, Texas, weight 44,610 pounds, rate 67 cents per 100 pounds, total amount of freight charges paid $298.89.

P. W. Reynolds, witness for plaintiff, testified:

My home is at Albany, but I stay at Cisco most of the time; I am manager of the Cisco Oil Mill, and have been such every since the mill was built, my recollection is seven years; I was manager in September and October 1901, I know that nature of this suit; prior
72 to the purchase of this cotton seed in Louisiana, I went to the agent — the T. & P. Ry. Co. at Cisco, Texas, for the purpose of finding out what the rates were; I can not recollect the exact date that I went to see the agent, but it was before these shipments were made; it was before I went to Louisiana myself; I went to see the agent twice; I went to him to find out what the rate was; then went to Louisiana, to see about the seed, and when I came back from Louisiana I again went to the agent about the rate; I also tried to find out about the rate at the other end of the line; I did not

make inquiry about the rates at Cottonport or Moreauville, but I did make inquiry at other points near there; I went to the agent of the T. & P. Ry. Co. at Cisco, George Langston; I do not recollect exactly how long I have known Mr. Langston; I should say 15 years; He has been acting as agent of the T. & P. Ry. Co. all of the time; when I called upon Mr. Langston I demanded to be shown the tariff sheets; he produced some sheets, but never did show me what I wanted; he said he could not find it, that he did not have it; he had some tariff sheets showing the rate from Alexandria and Melville, and down through that country, but did not have any from the points I wanted to find out about; I asked him for the tariff sheets both times I went there; I also asked him what the rates would be, he said he did not know exactly what they would be, but that it would be something less than two local rates added together, the rate up to Alexandria plus the rate from Alexandria to Cisco; that that was the best information he could give me; I do not remember exactly what length of time elapsed between the first and second time I went to see Mr. Langston with reference to these rates, but my best recollection is about 20 days elapsed between the two visits;
73 both of my calls upon Mr. Langston were prior to these shipments; he told me what the rate from Alexandria to Cisco would be; he had the tariff giving the rate and showed it to me; I was at Cisco when the cotton seed arrived there; there was a right smart said between Mr. Langston and myself with reference to the payment of the freight when the cotton seed arrived; I objected to the payment of 67 cents per 100 pounds; but finally paid it; I told Mr. Langston I would pay it under protest; in the purchase and shipment of the cotton seed from Moreauville and Cottonport, I relied and acted upon the statement that Mr. Langston made to me, that the freight would be less than the sum of the two locals, the rate from the point of shipment to Alexandria plus the rate from Alexandria to Cisco; I bought the cotton seed on that ground, otherwise I would not have bought it; he did not tell me what the rate would amount to; he just told me he thought it would be less than the two rates; he told me he did not know; after I found the railway company was charging us at the rate of 67 cents we did not make any more through shipments from that country; we had ordered seed shipped through, but countermanded the orders; we had subsequent shipments billed to the Cisco Oil Mill, Alexandria La. and rebilled from Alexandria to Cisco, Texas; when the shipments were billed in that way it made the through rate from points right near Moreauville and Cottonport about the sum of the two locals; according to my recollection we did not make any other shipments from Moreauville and Cottonport, but we had some shipments to come just beyond those points. The sum of the two locals from points just beyond Moreauville and Cottonport was about 30 cents, and from points this side of Moreauville and Cottonport the sum
74 of the two locals was a little less than 30 cents in cases where we billed the shipments as I have stated, the through rate from the points of origin to Cisco did not exceed the sum of the two local rates; by shipping them that way we just paid the two local

rates; Mr. Langston did not produce any tariff sheets showing freight rates from any points in La. to Cisco Texas, except Alexandria, Melville and New Orleans; he told me those were the only rates he had; he made a second search for the rates, and then told me those were all he had.

Cross-examination:

According to my recollection we did not make any other shipments from Moreauville and Cottonport; Mr. Langston did show me the tariff rates on cotton seed from Alexandria, Melville and New Orleans to Cisco.

E. L. SARGENT, a witness for plaintiff, testified by deposition, as follows:—

My name is E. L. Sargent; I reside in Dallas, Texas; I am in the employment of the Texas & Pacific Ry. Co. and hold the office of general freight agent, and have held said office for ten years; my duties are the general supervision of freight rates; I held such position on the 20th, 25th, and 28th and 26th days of September 1901, and my duties at that time were the general supervision of freight rates. If the rates alluded to as being in effect over the Texas & Pacific Railway Co. on the 20th, 25th, 26th and 28th of September, 1901, were local rates in the states of Arkansas, Louisiana or Texas, they were made and promulgated by the railroad Commission having charge of rates in those states, and I was not responsible for them. If they were the interstate rates while I did not probably handle the details of making the rates, they were promul-
75 gated over my signature. And in answering the preceding and following interrogatories, I wish to state here that I have only the general supervision of the rates, and have nothing to do with the details of handling them, and the information I give is not from my own personal knowledge, but is obtained from the records of the office and from my assistants. The towns of Cottonport, Moreauville, Alexandria and Melville, in the State of Louisiana, and Cisco and El Paso, Texas, are stations on the Texas & Pacific Railway; Cottonport and Moreauville, as shown by the map, are practically in an eastern direction from Alexandria; the maps show that the towns of Cisco and El Paso are a little north of west from Alexandria, La., and the distance tables show that Cisco is 449½ miles from Alexandria La. and the same tables show the distance from Alexandria La. to El Paso Texas, to be 947 8/10 miles; the maps show that the towns of Melville and Alexandria are a little south of east from El Paso and the distance tables show Melville, La. is 1013 7/10 miles from El Paso, Texas. The distance from El Paso to Alexandria has already been given. Alexandria is intermediate between Cottonport and Moreauville, La., and the town of Cisco, Texas. I am not familiar with the rates inquired about as being in effect on the Texas & Pacific Railway on cotton seed in bulk in car load lots September 20th, 25th, 26th, and 28th, 1901. Between Cottonport and Alexandria, Moreauville and Alexandria, Alexandria and Cisco, Alexandria and El Paso and Melville and El Paso, but I can obtain and give them from the records of my office; the records

of my office show the freight rates in effect on and charged by the Texas & Pacific Railway for transporting Cotton seed, in bulk, in car load lots between stations on that line on the 20th, 25th,
76 26-, and 28th days of September, 1901, L. D. No. 461-H, effective July 4th 1901, and in force on the date mentioned, shows a rate of ten cents per hundred pounds on cotton seed, in car loads, minimum weight 30,000 per car, except where marked capacity of car is less, for distance under 50 miles and over 40 miles, which would make the rate between the points mentioned. Between Moreauville and Alexandria *and* rate would be the same as between Cottonport and Alexandria just given. As to the rate between Alexandria and Cisco, S. W. Tariff, 12-D, I. C. C., 194, our J. D. 4243-H, effective January 25, 1901 and in force on the date mentioned, name a rate of 20 cents per 100 pound- on cotton seed, in car load lots, mi*n*imus weight 40,000 pounds per car, between Alexandria and El Paso the same tariff shows, on cotton seed shipped to Mexico, the division of the rate from Alexandria to El Paso, on the dates mentioned was 35 cents per 100 pounds, on cotton seed in car loads, minimum capacity of car 24,000 pounds per car, from Melville to El Paso the same rate and conditions applied as on the shipment from Alexandria to El Paso. On shipments from Cottonport to Alexandria and from Moreauville to Alexandria, the minimum was 30,000 pounds per car on the 20th, 25th, 26th, and 28th of September 1901, except where marked capacity of car was less; if marked capacity of car was less, then the marked capacity of the car would be the minimum load. Between Alexandria and Cisco the minimum weight was 40,000 pounds per car, and from Alexandria to El Paso the minimum weight was 24,000 pounds to the car, and from Melville to El Paso the minimum weight was the same as from Alexandria to El Paso; On September 20th 25th and 28th 1901, shipper could ship cotton seed, in bulk, in car load lots over the Texas & Pacific Railway from Cottonport and Moreau-
77 ville to Alexandria at 10 cents per hundred pounds. From Alexandria to Cisco at 20 cents per 100 pounds; from Alexandria to El Paso for 35 cents per hundred pounds, and from Melville to El Paso at 35 cents per 100 pounds; subject to the minimum weights hereinbefore referred to. The freight rates between Moreauville and Alexandria and Alexandria and Cisco are based on distance, but the rate between Alexandria and El Paso was not based on distance, but was made principally to meet competitive conditions from the other territories, in order to put seed for planting purposes into the Republic of Mexico. The rate Between Melville and El Paso was based on the same as between Alexandria & El Paso. A shipment of freight from the town of Cottonport and Moreauville to Cisco via the Texas & Pacific Railway would pass through the town of Alexandria. The rate on shipments of cotton seed in bulk, in car load lots, between stations on the Texas & Pacific Railway in Louisiana, on September 20th, 25th, 26th and 28th 1901, where the distance was 50 miles and over 40 miles, was 10 cents per hundred pounds, subject to the minimum weights above named. The freight tariffs testified about were published and made public prior to September

20th 1901, As to whether or not a claim was filed by the plaintiff herein, or by any person for it, for overcharge on four car loads of cottton seed shipped over the Texas & Pacific Railway in September 1901, three cars from Moreauville, La. to Cisco Texas, and weighing, respectively, 40,090 pounds, 44,610 pounds, and 40,530 pounds, and one car shipped from Cotton Port, La. to Cisco, Texas, weighing 48,200 pounds said claim aggregating $641.69, I have to say that from an examination of the records of my office I find that G. T. Reynolds, had referred this matter in the shape of a claim to my office, and the same was returned to him, declined, by letter dated October 8th 1902.

78 Cross-examination:

At the time these shipments were made the legal tariff rate from all points mentioned, except Alexandria, La. was class A, or 67 cents per 100 pounds, subject to the minimum weight of 24,000 pounds to the car, to Cisco, Texas. The rate from Alexandria La. to Cisco, Texas, at that time being as shown by S. W. Tariff Committee, Tariff 12-D, I. C. C. 194, our J. B. 4243-H, effective January 25, 1901, was 20 cents per 100 pounds minimum weight 40,000 pounds to the car. There was a published interstate rate between all these points and Cisco. The Louisiana Commission had in effect, at the time these shipments moved, rate on cotton seed in car loads between Cottonport and Moreauville, La. and Alexandria La. These rates were 10 cents per 100 pounds, minimum weight 30,000 pounds per car, except where the marked capacity of car was less. The through rate from Cottonport, Moreauville and Melville La. to Cisco Taxas at the time these shipments moved, as per legal teriff filed with the interstate commerce commission, was 67 cents per 100 pounds, on cotton seed in car loads, subject to the minimum weight of 24,000 pounds per car.

H. L. REDFIELD, a witness for the plaintiff, testified (by deposition) as follows:

My name is H. L. Redfield; I reside in Dallas, Texas; am assistant general freight agent of the Texas & Pacific Ry. Co. and have held that position for 5 or 6 years. I was so employed on the 20th, 25th, 26th and 28th days of September, 1901. My duties are the supervision over the issuance of tariffs, the other general business of the freight department on September 20th, 25th, 26th and 28th 1901, as assistance general freight agent of the Texas & Pacific Ry. Co. I did have something to do with the freight rates put in effect on the Texas & Pacific Railway, and charged by it on said dates
79 mentioned for transporting freight, except to the extent that the rates are subject*ion* to the jurisdiction of the several states railroad commission having charge of freight rates in the several states, locally, through which the Texas & Pacific Railway runs, namely, the railroad commission of Texas, the railroad commission of Louisiana, and the railroad commission of Arkansas. The towns of Cottonport, Moreauville, Alexandria and Melville, La. and Cisco and El Paso, Texas, are stations on the line of the Texas & Pacific

Railway. According to the map the towns of Cottonport and Moreauville are a little south of east of Alexandria, and according to the distance tables of the Texas & Pacific Ry. Co. the distance from Cottonport to Alexandria is 40 4/10 miles, and the distance from Moreauville to Alexandria is 48 3/10 miles. According to the map the towns of Cisco and El Paso are a little north of west of Alexandria and the distance from Alexandria to Cisco, according to the di-*at*nce tables of the Texas & Pacific Ry. Co. is 449½ miles, and from Alexandria to El Paso is 947 8/10 miles. According to the map the towns of Melville and Alexandria are a little south of east from El Paso, and the distance from El Paso to Melville, according to the distance tables, is 1013 7/10 miles, and from Alexandria to El Paso is 947 8/10 miles. The town of Alexandria is a station on the line of the Texas & Pacific Ry. Co. between Cottonport and Moreauville and the town of Cisco. I am familiar with the freight rates in effect on the Texas & Pacific Railway for transporting cotton seed in bulk in car loads, September 20th, 25, 26th and 28th 1901, between Cottonport and Alexandria; between Moreauville; between Alexandria and Cisco, between Alexandria and El Paso, and between Melville and El Paso.

The freight rates on said dates between Cottonport and
80 Alexandria and between Moreauville and Alexandria, was 10 cents per 100 pounds on cotton se-d, in car loads, minimum weight 30,000 to the car, except where the marked capacity of the car was less, in which event the marked capacity of the car would govern the minimum weight. The rates on the dates specified on cotton seed in car load lots between Alexandria and Cisco was 20 cents per 100 pounds, minimum weight 40,000 pounds to the car, the rates on the dates named on cotton seed in car loads from Alexandria to El Paso was 35 cents per 100 pounds, for shipments going into Mexico, there being no consumption of cotton seed in El Paso for planting or manufacturing purposes, or otherwise. The rate from El Paso to Alexandria was 77 cents per 100 pounds, minimum weight 24,000 pounds to the car. The rate on the dates specified on cotton seed in car loads from Melville to El Paso was 35 cents per 100 pounds on shipments going to Mexico, there being no consumption of cotton seed in El Paso for planting or manufacturing purposes, or otherwise, from El Paso to Melville the rate on said dates on cotton seed in car loads was 77 per 100 pounds, minimum weight 24,000 pounds to the car, the minimum car load of cotton seed, when shipped in bulk, under the freight tariff in effect on September 20th, 25th, 26th and 28th 1901, between Cottonport and Alexandria, was 32,000 per car, except where the marked car was less, in which event the marked capacity of the car would govern the minimum weight. Between Moreauville and Alexandria it was the same as above specified Between Alexandria and Cisco 40,000 pounds per car, between Alexandria and El Paso, 24,000 pounds per car, and between Melville and El Paso the same. On September 20th, 25th, 26th and 28th
1901, a shipper could ship cotton seed from Moreauville and
81 Cottonport to Alexandria at 10 cents per 100 pounds, subject to the minimum above specified.

He could ship from Alexandria to Cisco at 20 cents per 100 pounds, subject to the minimum weight. He could not obtain a rate of 20 cents per 100 pounds. From Alexandria to El Paso, as the legal tariff provided another rate, above named. He could ship from Melville to El Paso at 35 cents per 100 pounds, had the shipment been going to Mexico, minimum weight 24,000 pounds, to the car, this being the proportion or division from Melville to El Paso on such shipment. The Mileages or distances upon which the Texas & Pacific Ry. Co. bases its freight charges upon shipments of freight between Cottonport and Alexandria, between Moreauville and Alexandria, and Cisco and Alexandria, are in accordance with the distances shown above. Between Alexandria and El Paso and between Melville and El Paso the rates are not based on what are known as distance rates. A shipment of freight from the towns of Cottonport and Moreauville to Cisco via the Texas & Pacific Railway, would pass through the stations of Alexandria. On shipments of cotton seed in bulk, in car load lots, between stations on the Texas & Pacific Railway in Louisiana, on September 20th, 25, 26, and 28, 1901, where the distance was 50 miles and over 40 miles, the rate was 10 cents per 100 pounds, subject to the minimum of 30,000 pounds per car, except where marked capacity of the car was less, in which event the marked capacity of the car would govern the minimum weight. The freight tariffs I have testified about were published and made prior to September 20, 1901. I have no recollection of a claim by the Cisco Oil Mill for overcharges on four car loads of cotton seed shipped from Moreauville to Cisco having been filed in the freight department. Such claims are handled by the freight claim
82 department, which is under the jurisdiction of R. Fenby, Auditor, Texas & Pacific Ry. Co., Dallas, Texas.

Cross-examination:

The legal tariff rate published and filed with the Interstate Commerce Commission at Washington, D. C. on Cotton seed, in car loads, minimum weight 24,000 pounds, to the car, from Cottonport, Moreauville and Melville, La., to Cisco, Texas, was 67 cents per 100 pounds. The rate at the same time from Alexandria to Cisco was twenty cents per 100 pounds, minimum weight 40,000 pounds to the car. There was a through interstate tariff, making a commodity rate of twenty cents per 100 pounds, on cotton seed in car load lots, minimum weight 40,000 pounds, to the car, from Alexandria to Cisco. There was no- published — to apply to and from points east of Alexandria.

There was a local commodity rate, approved by the railway commission of Louisiana, in force between Cottonport and Alexandria, Moreauville and Alexandria, and Melville and Alexandria. There was also a published through rate of 67 cents per 100 pounds on cotton seed in car loads, minimum weight 24,000 pounds per car, from Cottonport, Moreauville and Melville to Cisco, Texas, and which was the only tariff in effect at that time applying to through shipments from Cottonport, Moreauville and Melville to Cisco. Said tariff was a legal issue, and filed with the interstate commerce com-

mission at Washington. The 67 cent rate was the regular tariff "Class A" which was the classification of cotton seed in car loads, and it would have been illegal for the railway company to have transcended the said published through tariff rate by attempting to apply the rate of the railroad commission *of the railroad*
83 *commission* of Louisiana from Cottonport, Moreauville and Melville to Alexandria, combined with the commodity rate of twenty cents per 100 pounds on cotton seed in car load lots from Alexandria to Cisco, the interstate commerce law providing that the published through rate of railroad companies shall be assessed in all cases, regardless of the fact that certain local combinations of local commodity rates otherwise might be used for the purpose of cutting the legally established through rates.

R. FENBY, a witness for plaintiff, testified (*by* deposition) as follows:

My name is R. Fenby; I reside in Dallas, Texas; I am Auditor of the Texas & Pacific Ry. Co., and have been so engaged since July 1, 1888. Our records do not show that any claim was presented by the Cisco Oil Mill, or any one for it, for overcharge on four cars of cotton seed, shipped in September 1901, from Moreauville and Cottonport, La. to Cisco, Texas, and I have no recollection of such a claim.

Cross-examination:

As far as I am informed the correct rate on the shipments in question was 67 cents per 100 pounds, in accordance with our tariff J. B. 4270-H. There was a published interstate rate between said points and Cisco of 67 cents per 100 pounds, as per tariff J. B. 4270-H. I have no information relative to the rate on cotton seed between the points named than is contained in the tariff referred to.

G. S. MAXWELL, a witness for defendant, testified:

I live at Dallas, Texas; I am chief clerk in the general freight department of the Texas & Pacific Ry. Co., and I have held the same position on the 20th 26th, 27th and 28th of September, 1901, I have in possession at this time a schedule of rates filed by the Texas & Pacific Ry. Co. with the interstate commerce commission
84 at Washington, which was in force and effect at the time mentioned. (It is agreed by and between counsel for plaintiff and defendant that the schedule of rates mentioned by the witness Maxwell had been properly filed with the interstate commerce commission in Washington, D. C.) J. B. 4278-H, I. C. C. # 202, established the rate of 67 cents per 100 pounds, minimum 24,000 pounds per car, on cotton seed in car loads between Cottonport and Moreauville, La., and Cisco, Texas, which rate was in effect during the months of September and October 1901, at the time the shipments involved in this suit were made; the tariff or schedule of rates which I have testified about is the general tariff of rates applying between Louisiana points and all points in Texas; the schedule originated in the general freight departments of the various lines form-

ing a part of the Southwestern Tariff Committee; the schedule was promulgated in the general freight department of the Texas & Pacific Ry. Co. and I was present at the time it was done; the information was then given to Mr. Cale, the chairmen of the Southwestern Tariff Committee, together with the information secured from the various other general freight departments, for compilation in this form; our office gave him the information so far as the T. & P. Ry. Co. is concerned; Mr. Cale acts as agent of all of the Texas lines in publishing these tariffs, as a matter of convenience and economy; he files the tariffs with the interstate commerce commission, and with the various railroads, which are members of the committee; prior to these shipments copies of this tariff had been sent to all local freight agents of the T. & P. Ry. Co. at the time of these shipments there was no through rate on cotton seed between Moreauville and Cottonport, La., and Cisco, Texas, in existence, ex-
85 cept the rate 67 cents per 100 pounds, which I have testified about.

Cross-examination:

An ordinary business man, without any outside information, could not take this tariff sheet alone, without referring to something else, and tell what the rate on cotton seed would be from any point.

Redirect examination:

A man would arrive at the tariff rate by referring to the western clasification in connection with this schedule of rates; the western classification is a sheet that is published and adopted universally by all of the railroads west of the Mississippi River for the classifications of all kinds of freight not specifically provided for by commodities rates; on the back of this schedule of rates is printed: "Subject to the western classification and exceptions thereto as named in classification exception series No. 1, current I. C. C. # 191."

At the time of the shipments in question, cotton seed was in Class A; the classification I have here applies to all roads west of the Mississippi River; as far as the classification is concerned, the country is practically divided into three districts. One classification applies to all the territory west of the Mississippi River and some of the territory between St. Louis and Chicago, you might say west of the Great Lakes, a line from Chicago to St. Louis, and the Mississippi marks the eastern boundary down to the Gulf; south of the Ohio River and east of the Mississippi River is what is called the Southern classification; business going from New Orleans to the southeast would take the southern classification; business from New Orleans going west would take the western classification. North of the Ohio River and East of the Mississippi River they have what they
86 call the Official Classification; in the book I have here marked western classification No. 35, cotton seed, in car load lots, minimum car load weight 24,000 pounds, takes class A; less than car load shipments of cotton seed take third class a higher rate; this is shown of page 105 of this book; this classification refers to everything; it gives the classification as it existed at the time of the ship-

ments involved in this suit; the classification is re-issued every six months, and is redistributed, and any changes that may have been made from time to time, are embodied in the new issues; but, so far as cotton seed is concerned I know of my personal knowledge that there has been no change in the rate.

GEORGE LANGSTON, a witness for the defendant, testified:

I live at Cisco; I am local agent for the Texas & Pacific Ry. Co. at Cisco, and was engaged in the same business during the year 1901; I am acquainted with the plaintiff in this suit; the paper handed me is a tariff which was in effect at the time of these shipments between Louisiana points and Texas; this tariff shows the rate on cotton seed in bulk, in car load lots, between Moreauville and Cottonport, La., and Cisco, Texas, at that time, to have been 67 cents; at that time the through rate from Moreauville and Cottonport La., to Cisco, Texas, on the cotton seed in car load lots was 67 cents per 100 pounds; I had one of these schedules of tariff rates in my office at Cisco at the time of these shipments.

Cross-examination:

At the time these shipments were made I had in my office a schedule showing the freight rates on cotton seed from Louisiana points to Texas points; I remember that Mr. W. P. Reynolds called
87 on me sometime prior to these shipments with reference to these freight rates; I had this tariff there at that time; I did not show it to Mr. Reynolds because we were looking for a commodity tariff on cotton seed from Louisiana points, and did not refer to this tariff at all; I do not remember distinctly that I told Mr. Reynolds at that time that from the tariffs before me I could not tell him what the freight rate would — from those points, but we had considerable conversation about the matter, and I think I made that kind of statement to him, I could not tell him what the freight rate would be, because, as I said before, we were looking for a rate on cotton seed as a commodity, and the tariff I have here, which was on file in my office at that time, is a general tariff; at that time we overlooked the fact that cotton seed was class A in the book of western classification of freights; we had the necessary information there if we had gone after it, but we overlooked it; an ordinary business man, not familiar with railroad terms and classification, could not, by inspection of this tariff sheet alone, without reference to anything else, tell what the freight rate on cotton seed would be from any point; it would be necessary to refer to the western classification to see how it was classed; I am certain that I had this tariff in my office at that time; when the cotton seed arrived at Cisco; And I demanded the freight rate at 67 cents per 100 pounds, Mr. P. W. Reynolds objected to the payment of that rate, on account of it being too high; I do not remember telling Mr. Reynolds that I could not tell him exactly what the freight rate would be, but that it would not exceed, or would be something less than the rate from point of shipment to Alexandria plus the rate from Alexandria to Cisco, but we had a good
88 deal of talk about it, first and last, and it is very likely thatI did tell him that.

Redirect examination:

This is the general tariff and gives the rate of the classification. The witness referring to the book of western classification, and a book containing schedule of rates.

In the District Court of Eastland County, Texas, January Term, A. D. 1904.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

—, J. H. Calhoun, District Judge of the 42d Judicial District of Texas, do hereby certify that the Attorney for the plaintiff and for the defendant failed to agree on a statement of facts in said cause, and so certified to me in writing, and each presented a statement of facts as prepared by him; and from said statement so presented to me, and my own knowledge of the facts, I have prepared the foregoing as a true and correct statement of facts in said cause and do certify the same to be correct, and the same is ordered to be filed as the statement of facts in said cause, this March 5, 1904.

J. H. CALHOUN,
Judge 42nd Judicial Dist., Presiding.

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Statement of Fact. Filed March 5th, 1904. R. L. Davenport, Clerk Dist. Court, Eastland Co., Texas.

Pl'ff's Assignment of Errors.

Filed 4/2/04.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

Suit Pending in the District Court of Eastland County, Texas, January Term, 1904.

89 Now comes the plaintiff in the above numbered and styled cause, and complaining of the rulings, action and judgment made and rendered in said cause on the trial thereof, files the following assignments of error:

First. The court erred in permitting the defendant to read in evidence, over the objection of the plaintiff, the following part of the answer of the witness, E. L. Sargent, to cross interrogatory No. 1: "At the time these shipments were made the legal tariff rate from

all points mentioned except Alexandria, La., was class A, or 67 cents per 100 pounds, as appears from plaintiff's bill of exception No. 1.

Second. The court erred in permitting the defendant over the objection of plaintiff, to read in evidence the following portion of the answer of the witness E. L. Sargent to cross interrogatory No. 2. There was a published interstate rate between all these points and Cisco, Texas, *B* as appears from plaintiff's bill of exception No. 2.

Third. The court erred in permitting the defendant to read in evidence, over the objection of plaintiff, the answer of the witness E. L. Sargent to cross interrogatory No. 3, as appears from plaintiff's bill of exception No. 3.

Sourth. The court erred in permitting the defendant to read in evidence, over the objection of plaintiff, the following portion of the answer of the witness H. L. Redfield to cross interrogatory No. 1: "The legal tariff rate published and filed with the interstate commerce commission at Washington, D. C. on cotton seed in car loads, minimum weight 24,000 pounds to the car, from Cottonport, Moreauville, and Melville to Cisco was 67 cents per 100 pounds," as appears from plaintiff's bill of exception No. 4.

90 Fifth. The court erred in permitting the defendant over the objection of plaintiff, to read in evidence the following portion of the answer of the witness H. L. Redfield to cross interrogatory No. 2. "There was also a published through rate of 67 cents per hundred pounds on cotton seed in car loads, minimum weight 24,000 pounds per car, from Cottonport, Moreauville and Melville to Cisco, Texas, and which was the only tariff in effect at that time applying to through shipments from Cottonport, Moreauville and Melville to Cisco; the said rate was a legal issue and filed with the interstate commerce commission, at Washington, as stated above, as appears from plaintiff's bill of exception No. 5.

Sixth. The court erred in permitting the defendant, over the objection of plaintiff, to read in evidence the answer of the witness H. L. Redfield to cross interrogatory No. 3, as appears from plaintiff's bill of exception No. 6.

Seventh. The court erred in permitting the defendant, over the objection of plaintiff, to read in evidence the answer of the witness R. Fenby to cross interrogatory No. 1, as appears from plaintiff's bill of exception No. 7.

Eighth. The court erred in permitting the defendant, over the objection of plaintiff, to read — evidence the answer of the witness R. Fenby to cross interrogatory No. 2, as appears from plaintiff's bill of exceptions No. 8.

Ninth. The court erred in permitting the witness, G. S. Maxwell, to testify over the objection of the plaintiff, in effect, that the printed tariff offered in evidence by defendant, had been duly pub-

91 lished prior to, and was effective at the time of, the several shipments involved in the suit, and that there was no other through rate effective between the points of shipment at that time, as appears from plaintiff's bill of exception No. 9.

Tenth. The court erred in its conclusions of facts, as set out in the sixth paragraph thereof, in finding and concluding that the books

contained the freight rates and classifications of freight on file in the office of defendant at Cisco, Texas, constituted the then published freight rates then in force on defendant's railway * * * and that said books, and the tables and schedules, rates and etc. — required by the interstate commerce act to be filed with the interstate commerce commission.

Eleventh. The court erred in its conclusion of law, in concluding and holding that the freight rates on the shipments complained of by the plaintiff, were controlled and governed by the interstate commerce act.

Twelfth. The court erred in its second conclusion of law in concluding and holding "That by the filing of the schedules freight rates and classifications of freights referred to in section 5 of the finding of facts, and furnishing copies of the same to the freight office at Cisco, and sending same to other freight offices, the cotton seed so shipped by defendant, (plaintiff) was subject to the tariff rate of 67 cents per 100 pounds under the provisions of the interstate commerce act."

Thirteenth. The court erred in its conclusion of law, in concluding and holding that, notwithstanding 30 cents per hundred pounds would have been a reasonable freight charge, and that 67 cents per hundred pounds was unreasonable and excessive, the defendant, under the terms of the interstate commerce act and printed
92 schedule filed, could not have legally charges any other freight rate than 67 cents per hundred pounds.

Fourteenth. The court erred in its fourth conclusion of law, in concluding and holding that plaintiff was concluded from a recovery herein by the terms and provisions of the interstate commerce act, and by the schedules and rates of defendant filed with the interstate commerce commission.

Fifteenth. The court erred in rendering judgment against, and not in favor of plaintiff, because the facts show: (1) That 30 cents per hundred pounds would have been a fair and reasonable freight charge for transporting the cotton seed: 2. That a freight rate of 67 cents per hundred pounds was unreasonable and excessive. 3. It was not proven, and does not appear from the facts given in evidence, at the time of the several shipments complained of, there was in effect on defendant's railway a legally established freight rate between the points of shipment on cotton seed in car loads, which exceed 30 cents per 100 pounds.

Sixteenth. The court erred in rendering judgment against, and not in favor of, plaintiff, because the facts given in evidence show that defendant was estopped to charge a freight rate of more than 30 cents per 100 pounds on the several shipments complained of.

Seventeenth. The judgment is contrary to and not supported by the facts, because the facts show: 1. That 30 cents per 100 pounds would have been a fair and reasonable freight rate and charge on the several shipments complained, and that a freight rate of 67 cents per 100 pounds was unreasonable and excessive; 2. It was not proven that there was in effect, at the time of the shipments,
93 an interstate rate, legally established, which exceeded 30 cents per 100 pounds. 3. The tariff showing the freight

rate on cotton seed between the points of shipment to have been 67 cents per 100 pounds had not been published as required by the interstate commerce act, and was not effective at the time of the movement of the several shipments complained of; and 4. That defendant was estopped to charge more than 30 cents per 100 pounds on the several shipments.

J. J. BUTTS,
Att'y for Plaintiff

No. 1458. Cisco Oil Mill *vs.* Texas & Pacific Ry. Co. Plaintiff's Assignment of Errors. Filed April 2nd, 1904. R. L. Davenport, Clerk Dist. Court, Eastland Co. Texas.

Cost Bill in District Court.

No. 1458.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

M–. —— —— to Officers of Court, Dr.

The Costs Accrued in the Above Entitled Cause to Adjournment of Jan. Term, 1904.

Clerk's Fees:	Dol. Cts
Issuing Writ, 1 & 1 copy	1.25
Docketing Cause	20
Docketing 3 Motions	45
Filing 35 papers	5.20
Entering 2 Appearances	30
Entering continuance 1	20
Entering each Order and Judgment 9	6.75
Swearing 8 witnesses	80
94 Approving Bond on Appeal	1.50
Assessing Damages	50
Taking Depositions	13.00
Entering Final Judgment	1.00
Taking Costs and Cop. thereof	25
Transcript to Court Appeals	55.45
Entering Sheriff's Return on Cit	50
Total Clerk's Fees	$87.35

Sheriff's Fees:	Dol. Cts.
Executing Writ and Copy and 1 mi	80
Total Sheriff's Fees	$ 80
Total Clerk's Fees	87.35
Total Costs	$88.15

THE STATE OF TEXAS, *County of Eastland:*

I hereby certify the above to be a correct amount of the costs in above entitled and numbered suit, up to this date.

Witness my hand and seal of said court, affixed at office in Eastland, of Eastland, this 8th day of April, 1904.

Attest:

[SEAL.] R. L. DAVENPORT,
Clerk District Ct., Eastland Co.

THE STATE OF TEXAS, *County of Eastland:*

I, R. L. Davenport, clerk of the District Court in and for Eastland County, Texas, do hereby certify that the above and foregoing 88 pages contain a true and correct copy of all the proceedings had on the trial of cause No. 1458 Cisco Oil Mill *vs.* Texas & Pacific Ry. Company.

95 In testimony whereof, I hereunto set my hand and affix the seal of the district court at office in Eastland, this the 8th day of April, A. D. 1904.

[SEAL.]

R. L. DAVENPORT,
Clerk Dist. Court, Eastland Co., Texas.

Endorsements on Transcript: 4618. Cisco Oil Mill, Appellant, *vs.* Texas & Pacific Ry. Co. Appellee. From the District Court of Eastland County. Applied for by J. J. Butts, attorney for appellant on the 2nd day of April, 1904, and delivered to J. J. Butts on the 9th day of April, 1904. R. L. Davenport, Clerk. Dist. Court Eastland County, Texas. Filed in the Court of Civil Appeals, at Fort Worth Texas, the 24th day of May, 1904. W. C. Strong, Clerk, Court of Civil Appeals Second Supreme Judicial District of Texas.

96 *Opinion of the Court of Civil Appeals.*

No. 4618.

CISCO OIL MILL, Appellant,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Appellee.

From District Court of Eastland County.

Opinion.

This action was instituted in the district court of Eastland County to recover alleged overcharges paid to appellee, under protest, for the shipment of four cars of cotton seed from the town- of Cottonport and Moreauville, Louisiana, to the City of Cisco, Texas, in the month of September, 1901. Appellee presented special plea and demurrers to the effect that it appeared from the petition that appellant was seeking relief predicated upon a violation of the provisions of the

Act of Congress generall- known as the Interstate Commerce Act, and that hence the trial court was without jurisdiction.

If required to adopt the construction of appellant's petition presented in the plea and demurrers it would follow that the trial court committed fundamental error in proceeding to trial and judgment as it did, for it is now established that in cases of interstate carriage, causes of action so based are cognizable alone by the district and circuit courts of the United States, as will be seen by a reference to the decision of our supreme court in the case of Gulf, Colorado & Santa Fe Railway Company *v.* Moore, 11 Texas Court Reporter, 424, and cases therein cited with approval. We conclude, however, that we are not compelled to give appellant's petition the construction suggested. Parts of it indeed declare upon a violation of the act of congress referred to and to this extent the district court was perhaps without jurisdiction, and appellee's cross assignments therefore well taken. But the petition set out all of the facts, the court over-
97 ruled said plea and demurrers and thereby, in effect, held that the petition stated a cause of action cognizable by the state courts, and it is our duty to uphold such ruling if by a fair construction of the petition we can do so. So that, we think all intendments are now in favor of appellant's petition, and of the trial court's jurisdiction. Giving the petition therefore, a favorable construction and excluding as surplusage the averments evidently designed to bring the case within the provisions of the Interstate Commerce Act, we find that the appellant company in what may be termed the first count in its petition, a form of pleading permissible under our laws, alleges in substance, among other things, not necessary to here notice, that in September 1901, it purchased and caused to be shipped over appellee's continuous line of railway, four cars of cotton seed from said towns of Cottonport and Moreauville, Louisiana, to said City of Cisco, Texas, for which the appellee company charged a freight rate of 67 cents per hundred lbs. which appellant was compelled to pay at Cisco before it could get possession of the cotton seed; that in the several bills of lading executed by appellee at the time of the shipment *bo* freight rate was therein specified; that a just and reasonable charge, freight rate or compensation for the transportation stated would have been and was 30 cents per 100 lbs; that the charge of 67 cents per 100 lbs. actually made and received as stated was unjust, unreasonable, and excessive; that the cotton seed so shipped aggregated 173,430 pounds, and that the amount of unjust unreasonable and excessive charges so demanded and collected by appellee was and is $641.69 for which appellant prayed judgment, with interest thereon at the legal rate from October 3, 1901.

The trial court found, among other things, a jury having
98 been waived, the facts of the shipment, freight charges made and received by appellee etc. as above stated, and also found as matter of fact "that 67 cents per hundred pounds for said freight was excessive and unreasonable. That 30 cents per hundred pounds, was a reasonable charge for freight on cotton seed in bulk, in car load lots, *of* exceeding 40,000 pounds from Cottonport and Moreauville to Cisco, Texas, at the time of these several shipments." The court,

however, having further found that the rate of 67 cents per hundred pounds was in accord with appellee's rate sheets and freight schedule which had been filed with the Interstate Commerce Commission and promulgated as provided by the act of Congress, concluded as matter of law that appellant was precluded from a recovery "by the terms and provisions of the Interstate Commerce Act of the United States Congress, and its schedules of the rates then filed with the Interstate Commerce Commission," and that appellee "could not have charged lawfully any other rate than 67 cents per hundred pounds." Hence judgment in appellee's favor was rendered.

The facts so alleged and found by the court are not attacked by any cross assignment of appellee as unsupported by the evidence; so that, we have substantially the same questions upon substantially the same state of facts presented and considered by us in the case of Abilene Cotton Oil Company *v.* Texas & Pacific Railway Company, from the district court of Taylor County, this day decided. For the reason given in that case, and which we deem unnecessary to here repeat, the trial court's conclusions of fact are hereby adopted and the judgment below reversed and judgment here rendered for the appellant, the Cisco Oil Mill for the sum of $641.69, with interest thereon from October 3, 1901, at the rate of 6% per annum, together with all costs.

99

T. H. CONNER,
Chief Justice.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, February 25, 1905.

W. C. STRONG, *Clerk.*

Judgment of Court of Civil Appeals.

4618.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

From District Court of Eastland County, February 25, 1905.

Opinion by Mr. Conner, Ch. J.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was error in the judgment; and it is ordered that such judgment be here rendered in favor of the appellant as should have been rendered in the trial court. It is accordingly ordered, adjudged and decreed by the court that the appellant, The Cisco Oil Mill, do have and recover of and from the appellee, The Texas & Pacific Railway Company, the sum of $641.69, with interest thereon from the 3rd day of October, 1901, at the rate of 6% per annum, together with all costs in this behalf expended, and that this decision be certified below for observance.

Motion for a Rehearing by the Appellee.

In the Court of Civil Appeals for the Second Judicial District of Texas, at Ft. Worth.

CISCO OIL MILL, Appellant,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Appellee.

In this case now comes the appellee, The Texas & Pacific Railway Company, and moves the court to set aside its judgment ren-
100 dered herein on the 25th day of February, 1905, and grant this appellee a rehearing for the following reasons, to-wit:

First: The court erred in sustaining appellant's tenth assignment of error and in thereby holding that the trial court erred in its conclusion of facts, as set out in the sixth paragraph thereof, in finding and concluding that the books containing the freight rates and classifications of freight, on file in the office of defendant at Cisco, Texas, constituted the then published freight rates in force on defendant's railway; and that said books, and the tables and schedules, constituted the rates, etc., required by the Interstate Commerce Commission.

Second: The court erred in sustaining appellant's twelfth assignment of error and in thereby holding that the trial court erred in its conclusion of law in concluding and holding "that by the filing of the schedule of freight rates and classifications of freight referred to in section No. 5 of the findings of fact and furnishing copies of the same to the freight office at Cisco and sending the same to the other freight offices, that the cotton seed so shipped by the defendant was subject to the tariff rates of 67 cents per 100 pounds under the provisions of the Interstate Commerce Act."

Third: The Court erred in sustaining appellant's thirteenth assignment of error and in thereby holding that the trial court erred in its conclusion of law wherein the trial court concluded and held that notwithstanding "that 30 cents per 100 pounds would have been a reasonable freight charge, and that 67 cents per 100 pounds was unreasonable and excessive, the defendant, under the terms of the Interstate Commerce Act, and printed schdules filed, could not have legally charged any other rate that 67 cents per 100 pounds."

101 Fourth: The court erred in sustaining appellant's fourteenth assignment of error and in thereby holding that the trial court erred in its fourteenth conclusion of law, in concluding and holding that plaintiff was precluded from a recovery herein by the terms and provisions of the Interstate Commerce Act, and by the schedules and rates of defendant filed with the Interstate Commerce Commission.

Fifth: The court erred in sustaining appellant's sixteenth assignment of error and in thereby holding that the trial court erred in rendering judgment against, and not in favor of, plaintiff; and in thereby holding that the defendant was estopped to charge more

than 30 cents per 100 pounds on the several shipments complained of.

Sixth: The court erred in overruling appellee's second counter proposition to appellant's first proposition under appellant's twelfth assignment of error and in thereby holding that it is not a good defense to an action for damages for alleged overcharge on freight for the defendant to show that, in obedience to the Interstate Commerce Act, it has adopted a schedule of rates, and that the charges complained of are in accordance with those in the schedule.

Seventh: The court erred in overruling appellee's third counter proposition to appellee's first proposition under appellant's twelfth assignment of error and in thereby holding that the schedule of rates required to be established, published and filed with the Interstate Commerce Commission by a Common Carrier, by the Interstate Commerce Act, is not *prima facie* the criterion in determining whether or not a given charge is unreasonable; and that in an action for damages against a common carrier for overcharge in freight (where the shipment is subject to the provisions of the Interstate Commerce law,) the burden does rest upon the plaintiff to
102 both allege and prove that the carrier had no published schedule of rates, or that the carrier charged plaintiff a rate in excess of the rates fixed in said schedule.

Eighth: The court erred in overruling appellee's fourth counter proposition to appellant's first proposition under appellant's twelfth assignment of error and in thereby holding that the shipments in controversy were not subject to the provisions of the Interstate Commerce Act, and that the judgment of the trial court was error.

Ninth: The court erred in overruling appellee's fifth counter proposition to appellant's first proposition under appellant's twelfth assignment of error and in thereby holding that the appellee was not bound by the schedule rate from the time it published its schedule of rates and filed the same with the Interstate Commerce Commission.

Tenth: The court erred in overruling appellee's sixth counter proposition to appellant's first proposition under appellant's twelfth assignment of error and in thereby holding that having established and published and filed its schedule of rates with the Interstate Commerce Commission, in obedience to the provisions of the Interstate Commerce Act, it would have been lawful for appellee to have collected from or charged appellant a greater or less rate than the schedule rate of 67 cents per 100 pounds.

Eleventh: The court erred in overruling appellee's first counter proposition to appellant's second proposition under appellant's twelfth asignment of error, and in thereby holding that the appellant's twelfth assignment of error and in thereby holding that the appellant's case need not be predicated upon the proposition that appellee had no published schedule of rates, or that it charged appellant a rate in excess of the rate fixed in its published schedule;
103 and that evidence of these facts was not a part of appellant's case, and that the burden was not upon appellant to both plead and prove such facts.

Twelfth: The court erred in overruling appellee's first counter proposition to appellant's third proposition under appellant's twelfth assignment of error and in thereby holding that a shipper seeking to recover damages under the provisions of the Interstate Commerce Act, upon the proposition that he has been charged an unreasonable rate for goods transported by a railway company, in order to be entitled to recover, need not plead and prove that the rate charged is unreasonable according to the provisions of that act; and that appellant was entitled to recover in this case notwithstanding it had failed to prove such facts on the trial of this case.

Thirteenth: The court erred in overruling appellee's second counter proposition to appellant's third proposition under appellant's twelfth assignment of error and in thereby holding that the Interstate Commerce Act does not provide for and prescribe a standard by comparison with which it may be determined whether a given rate is or is not unreasonable within the meaning of the act; and that said standard is not the rate established, published and filed by the railway company with the Interstate Commerce Commission in obedience to the provisions of the Act.

Fourteenth: The court erred in overruling appellee's first counter proposition to appellant's thirteenth assignment of error and propositions thereunder and in thereby holding that the reasonable or unreasonabl-ness of appellee's through rate of 67 cents per 100 pounds can be ascertained or determined by comparison with the local rate established by the railroad commission rate from Cottonport, Moreauville and Melville, La., to Alexandria, La., fixed by the Railroad Commission of the State of Louisiana, and the tariff
104 rate of 20 cents per 100 pounds established by the appellee to apply to shipments originating at Alexandria, La., and destined for Texas points.

Fifteenth: The court erred in overruling appellee's second counter proposition to first proposition under appellant's thirteenth assignment of error and in thereby holding that theory and conjecture, or the comparison of one isolated rate with another, is sufficient to establish the reasonable- or unreasonableness of a given rate; and that the plaintiff can recover in a suit for damages predicated upon the violation of the provisions of the Interstate Commerce Act, for the overcharge of freight for the transportation of goods by a common carrier, although such plaintiff has failed to plead and prove such facts as are necessary to establish the unreasonableness of the rate complained of.

Sixteenth: The court erred in overruling appellee's first counter proposition to third proposition under appellant's fourteenth assignment of error and in thereby holding that whatever right of action that may have existed at common law, in favor of the shipper, for damages for overcharge of freights, was not superseded by the remedies provided by the Interstate Commerce Act.

Seventeenth: The court erred in overruling appellee's first cross assignment of error and in thereby holding that the trial court did not err in overruling this defendant's plea in abatement to the right

of plaintiff to further prosecute this suit in and before the District Court of Eastland County, Texas.

Eighteenth: The court erred in overruling appellee's second cross assignment of error and in thereby holding that the trial court did not err in overruling this defendant's general exception urged by it against plaintiff's petition.

105 Nineteenth: The court erred in reversing the judgment of the trial court and in rendering judgment for the appellant, the Cisco Oil Mill, for the sum of $641.69, with interest thereon from October 3, 1901, at the rate of 6% per annum, together with all costs.

J. J. Butts, Esq., of Cisco, Texas, is the attorney of record for the appellant, the Cisco Oil Mill.

Appellee respectfully prays the court for a rehearing and an affirmance of the judgment rendered in its favor by the trial court.

H. C. SHROPSHIRE,
Attorney for Appellee, The Texas & Pacific Railway Company.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, March 9, 1905.

W. C. STRONG, *Clerk.*

Order of the Court of Civil Appeals Overruling Motion for Rehearing.

4478/4618.

CISCO OIL MILL
vs.
TEXAS & PACIFIC RY. CO.

MAY 20, 1905.

This day came on to be heard the motion by the appellee for rehearing in this cause, and the same having been duly considered by the Court, is overruled.

Petition for Writ of Error to United States Supreme Court.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

To the Honorable T. H. Conner:

106 Your petitioners, the Texas & Pacific Railway Company, a corporation, respectfully shows that heretofore, to-wit: on the 20th day of February, 1904, there was tried in the Dis-

trict Court of Eastland County, Texas, a case in which the Cisco Oil Mill was plaintiff and your petitioner was defendant; said suit being styled No. 1458, Cisco Oil Mill *vs.* Texas & Pacific Railway Company.

The declaration of the said Cisco Oil Mill, Plaintiff in said cause, was a petition for the recovery of damages against the Texas & Pacific Railway Company for the recovery of $641.69, alleged overcharge of freight on four cars of cotton seed shipped by said Cisco Oil Mill over the railway of the said Texas & Pacific Railway Company from Cotton Port and Moreauville, Louisiana, to Cisco, Texas, respectively on September 25th, 26th, and 28th, 1901, and interest was prayed on said amount from October 3, 1901.

It was alleged in substance that the sum of 39¢ per hundred pounds was a fair, just and reasonable price to charge as compensation for carrying and transporting said cotton seed as same were transported from the aforesaid stations to the said station of Cisco in the State of Texas; that in truth and fact the said Texas & Pacific Railway Company did charge said Cisco Oil Mill the sum of 67¢ per hundred pounds, which was unreasonable and excessive, and that the said Cisco Oil Mill was compelled to pay said excessive amount of freight rate, and that the amount so charged and received over and above what was a fair and reasonable rate amounted to the sum of $641.69.

It was further alleged in said petition that prior to September, 1901, the Texas & Pacific Railway Company had issued and established tariffs for charges and freights for the transportation of cotton seed in bulk between stations on its railway line in the State of Louisiana, and that the regular tariff rate between the towns
107 of Moreauville and Cottonport and the town of Alexandria in the State of Louisiana was 10¢ per hundred pounds. The defendant had made, established, promulgated and made public its tariff rates on cotton seed in bulk from the town of Alexandria, Louisiana, to Cisco, Texas, which said tariff rate was 20¢ per hundred pounds, so that the sum of the two rates was 30¢ per hundred, and that it was the duty of the said Texas & Pacific Railway Company to transport and carry the said cotton seed from the towns of Moreauville and Cotton Port to the said Town of Cisco for a charge and compensation not exceeding the sum of the two rates aforesaid, and that the said Texas & Pacific Railway Company collected from the said Cisco Oil Mill the sum of $641.69, same being more than it should have done had it charged the sum of the two local rates aforesaid.

Upon the trial of said cause in the said District Court of Eastland County, Texas, your petitioner, by proper plea in abatement and by proper exceptions presented to the petition of the said Cisco Oil Mill, resisted the right of the said Cisco Oil Mill to sue and recover in the District Court of Eastland County upon the following grounds: That the shipment involved in the suit was shown to have been an interstate shipment, and therefore any suit to recover damages on account of any excessive, unreasonable or unjust overcharge made and collected for the transportation of said shipment was wholly

within the jurisdiction of a District or Circuit Court of the United States, and that the District Court of Eastland County, Texas, had no jurisdiction to hear and determine said cause.

The plaintiff in error also filed a general denial to the allegations in the petition of the said Cisco Oil Mill, and by special answer plead that prior to the shipment complained of and set forth in said petition, and that in accordance with
108 the provisions of an Act of Congress, passed February 4, 1887, and known as the Interstate Commerce Act, had made, promulgated, published, posted and filed with the Interstate Commerce Commission such tariff rate, and which said tariff rate between the points of Moreauville and Cotton Port, Louisiana, and the town of Cisco, Texas, was 67¢ per hundred pounds, which was the amount it actually charged and received, and that by virtue of the provisions and terms of said tariff rates so issued, published and filed, and that by the terms and provisions of said act of Congress the said Texas & Pacific Railway Company could not legally have charged, demanded or received from the said Cisco Oil Mill a greater or less rate for the transportation of said cotton seed than the said sum of 67¢ per hundred pounds.

Upon the trial of the cause raising the above issues a judgment was rendered by the District Court of Eastland County in favor of your petitioner, and against the said Cisco Oil Mill, whereupon the said Cisco Oil Mill regularly appealed said cause to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, that being the highest court of law or equity in said State in which a decision could be had in said cause.

At the October Term, 1904, of the Court of Civil Appeals for the Second Supreme Judicial District of Texas said appeal was regularly and duly submitted in said Court of Civil Appeals for the Second Supreme Judicial District of Texas, and on the 25th day of February, 1905, the said Court of Civil Appeals rendered its judgment and decision wherein it ordered, decreed and directed that the judgment of the District Court of Eastland County, Texas, be reversed, and that a judgment in favor of the said Cisco Oil Mill for the sum of
109 $641.69, with interest thereon and all costs of suit, be rendered against your petitioner, which was accordingly done.

Your petition- filed its motion for rehearing, which came on to be heard on the 20th day of May, 1905, which said motion for rehearing was overruled.

Your petitioner further shows that the issues made in District Court and the errors assigned in said Appellate Court raised the question hereinbefore set out, and that each of said questions raised and presented a federal question in said cause, to-wit:

I.

That said shipment being an interstate shipment and said suit being to recover damages on account of an alleged excessive, unreasonable and unjust overcharge could only be prosecuted and determined within the jurisdiction of a District or Circuit Court of the

United States, and that the District Court of Eastland County, Texas, had no jurisdiction to hear and determine said cause.

II.

That said shipment being an interstate shipment and it being made to appear that the Texas & Pacific Railway Company had complied with the terms and provisions of the act of Congress of February 4, 1887, entitled An Act to Regulate Commerce, and known as the Interstate Commerce Act, with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit, and that the regular published tariff rates in force and in effect between the points described in said suit were the sum of 67¢ per hundred pounds, and therefore the said Texas & Pacific Railway Company was entitled to charge and receive said amount, and any judgment or ruling to the contrary was repugnant
110 to, in conflict with, in violation of, and in contravention with the statutes of the United States with reference to the regulation of interstate commerce and the provisions therein claimed.

III.

That this petitioner set up as a defense to the cause of action presented in the suit below, the want of authority or power on the part of the District Court of Eastland County, Texas, or the Court of Civil Appeals upon appeal to set aside the freight rate established upon an interstate shipment which had been regularly published and filed with the Interstate Commission, and rendered a judgment for damages because of the charging and collecting such regular published tariff rate.

IV.

That the interpretation placed on the Interstate Commerce Act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was contrary to, in violation of, and in contravention with the statutes of the United States, as to the regulation of interstate commerce.

The petitioner further shows that the said judgment of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was and is a final judgment in the highest court in the State of Texas in which a decision in said suit could or can be had.

The petitioner further shows that a federal question was made in said cause, to-wit: as hereinbefore set out, and that the said judgment of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was repugnant to and in conflict with the laws of the United States and the Interstate Commerce Acts of its Congress aforesaid, and especially sections 8 and 9 of the act
111 entitled An Act to Regulate Commerce, approved February 4, 1887, that petitioner claimed a title, right, privilege and immunity under and by virtue of said acts aforesaid, and there was drawn into question the construction and application of said Acts,

and the decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was against the said title, right, privilege and immunity claimed thereunder; and that a decision of said federal question was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, together with the answer of the Supreme Court, to the questions certified to it by said Court of Civil Appeals for the Second Supreme Judicial District of Texas in said case, and prays that a writ of error to said Court of Civil Appeals for the Second Supreme Judicial District of Texas be allowed: that citation be granted and signed; that the bond herewith presented be approved, and that upon a compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of the Court of Civil Appeals for the Second Supreme Judicial District of Texas be reversed.

T. J. FREEMAN,
H. C. SHROPSHIRE,
Attorneys for the T. & P. Ry. Co., Plaintiff in Error.

The writ of error, as prayed for in the foregoing petition, is hereby allowed, this the 14 day of June, 1905; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the
112 sum of Two Thousand dollars, dated at Fort Worth, Texas, this the 14 day of June, A. D., 1905.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ of error is this day lodged in the Clerk's office for the use of the defendant in error, this the 14 day of June, 1905.

[SEAL.]

W. C. STRONG, *Clerk.*

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas June 14, 1905.

W. C. STRONG, *Clerk.*

Writ of Error to United States Supreme Court.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the state in which a decision could be had in the said suit between the Cisco Oil Mill, a corporation, and the Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of
113 a clause of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, and manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, could be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 13 day of July, 1905, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14 day of June, in the year of our Lord, 1905.

[SEAL.]

J. H. FINKS, *Clerk,*
By J. B. FINKS,
Deputy Clerk, United States Circuit Court
for the Northern District of Texas.

Allowed by
T. H. CONNER,
Chief Justice of the Court of Civil Appeals
for the Second Supreme Judicial District of Texas.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

W. C. STRONG, *Clerk.*

114 *Bond on Writ of Error to Supreme Court of the United States.*

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, the Texas & Pacific Railway Company, a corporation, as principal, and Edw. O. Tenison and C. R. Bully as sureties, are held and firmly bound unto the Cisco Oil Mill, a corporation, in the sum of Two Thousand Dollars, to be paid to the obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents, yet upon these conditions: that,

Whereas, the above named plaintiff in error, the Texas & Pacific Railway Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Second Supreme Judicial District of Texas,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, the Texas & Pacific Railway Company, shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seal, this the 14th day of June, A. D., 1905.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN,
EDW. O. TENISON,
C. R. BUDDY.

115 I hereby approve the foregoing bond and sureties, this the 14th day of June, A. D., 1905.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas June 14, 1905.

W. C. STRONG, *Clerk.*

Citation in Error to the United States Sup. Court.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Citation in Error.

To Cisco Oil Mill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, wherein the Texas & Pacific Railway Company, a corporation, is plaintiff in error, and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, this the 14 day of June, in the year of our Lord, One Thousand, Nine hundred and Five.

116

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Copy of the within citation served this the 14 day of June, 1905, at the office of the Cisco Oil Mill, in the City of Cisco, in the State of Texas.

J. J. BUTTS,
Att'y for Cisco Oil Mill, Defendant in Error.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

W. C. STRONG, *Clerk.*

Assignments of Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Now comes the Texas & Pacific Railway Company, plaintiff in error, and respectfully submits that in the record proceedings, decision, and final judgment of the Court of Civil Appeals for the Second

Supreme Judicial District of Texas, for the State of Texas, in the above entitled matter there is manifest error in this to-wit:

I.

The allegations in the petition filed in the District Court of Eastland County, Texas, by defendant in error, the Cisco Oil Mill, and the testimony offered on the trial of said case showed that the shipment of cotton seed was made over the line of the Texas & Pacific Railway Company from certain points in the State of Louisiana to a point in the State of Texas, and that same was an interstate
117 shipment; and it therefore followed that any suit to recover damages on account of any excessive, unreasonable or unjust freight charge made and collected by the Texas & Pacific Railway Company for the transportation of said shipment was wholly within the jurisdiction of a district or circuit court of the United States; and that the district court of Eastland County, Texas, had no jurisdiction to hear and determine said cause.

The said Court of Civil Appeals erred in reversing the judgment and decree of the district court of Eastland County rendered in said cause, and in proceeding to render a judgment against this plaintiff in error, the Texas & Pacific Railway Company.

II.

The said Court of Civil Appeals erred in refusing to sustain the first cross assignment of error presented to it by this plaintiff in error, and in approving the action of the trial court, wherein said trial court overruled the plea to the jurisdiction urged by this plaintiff in error, which said plea was to the effect that the district court of Eastland County was without jurisdiction to hear and determine any suit or claim for damages involving the shipment described in petition of the said Cisco Oil Mill, filed in said cause.

III.

Upon the trial of said cause in the district court of Eastland County, Texas, the Texas & Pacific Railway Company plaintiff in error, presented and urged a general exception to the allegation in plaintiff's petition, based upon the ground that the allegations contained in the petition of the Cisco Oil Mill showed that the said district court of Eastland County was without jurisdiction to hear and determine the issues therein involved, which said excep-
118 tion was overruled by the said trial court, and upon appeal said action of the court was assigned as error by the said Texas & Pacific Railway Company, as will appear from the second cross assignment of error presented to said Court of Civil Appeals. It says that the said Court of Civil Appeals erred in failing to sustain said cross assignment of error, and in proceeding to render a judgment against this plaintiff in error.

IV.

The said Court of Civil Appeals erred in adopting the conclusions of fact found by the trial court, and in rendering a judgment against this plaintiff in error, which action was erroneous, in that said trial court held that the freight charges collected and received were unreasonable and excessive, when in fact there was no evidence to sustain such finding and judgment of the court.

V.

The trial court held that the Texas & Pacific Railway Company had complied with the terms and provisions of the act of Congress of February 4, 1887, entitled An Act to Regulate Commerce, and known as the Interstate Commerce Act, with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit; and further held as a conclusion of law that the Texas & Pacific Railway Company was entitled to collect and receive the amount as shown by this tariff rate, to wit: 67¢ per hundred pounds.

It says that the said Court of Civil Appeals erred in not sustaining the holding of the said trial court in this respect, and in rendering a judgment against this plaintiff in error based upon a freight rate lower than that fixed by the said published tariff rate.

119

VI.

It says that the judgment of the said Court of Civil Appeals is repugnant and in conflict with the laws of the United States, and especially with those several acts of the Congress of the United States commonly known as an act to regulate commerce, approved February 4, 1887, and acts amendatory thereto, especially sections 8 and 9 of said act, approved February 4, 1887.

VII.

The said Court of Civil Appeals erred in reversing the judgment of the district court of Eastland County, and in rendering a judgment against this plaintiff in error, because said judgment of the said Court of Civil Appeals is repugnant to, and in conflict with, and is contrary —, in violation of, and in contravention with the statutes of the United States with reference to the regulation of interstate commerce and provisions therein claimed.

VIII.

The said Court of Civil Appeals erred in rendering any judgment herein against plaintiff in error, because there was drawn into question the construction and application of the statute of the United States, under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the said Court of Civil Appeals was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

IX.

The said Court of Civil Appeals erred in holding that although the regular published tariff rate under the terms and provisions of the interstate commerce act was 67¢ per hundred pounds, and which amount the said plaintiff in error collected, yet that said court as well as the district court of Eastland County had the jurisdiction
120 and power to set aside said regular published tariff rate and to hold that same was unreasonable and unjust, and to hear and determine what was a reasonable and just rate to be charged, and to render a judgment for any unreasonable and excessive amount charged and collected.

X.

The interpretation placed on the interstate commerce act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas is contrary to, in violation of, and in contravention with the statutes of the United States as to the regulation of interstate commerce.

T. J. FREEMAN,
H. C. SHROPSHIRE,
Attorneys for the Texas & Pacific Ry. Co.,
Plaintiff in Error.

Wherefore, the said Texas & Pacific Railway Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored all things which it has lost by the action, and because of the said judgment and decision.

T. J. FREEMAN,
H. C. SHROPSHIRE,
Att'ys for the T. & P. Ry. Co.,
Plaintiff in Error.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

W. C. STRONG, *Clerk.*

121 *Bill of Costs in Court of Civil Appeals.*

Bill of Costs in Court of Civil Appeals.

Filing Record	.50
Docketing cause	.50
Appearances	1.00
Filing and Entering Motion	.35
Orders	2.00
Filing papers	2.30
Entering judgment	1.00
Taxing costs	.50
Certificate with seal	.50

Mandate	1.50
Recording opinion	1.80
Certified copy of bill of costs	.70
Certified copy of Motion for rehearing	2.35
Issuing Notices	3.00
Issuing Precepts	2.00
Sheriff's Fees	2.00
Transcript to United States Supreme Court	52.00
Total	$74.00

I, W. C. Strong, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct account of the bill of costs accrued in said Court in the above entitled and numbered cause wherein the Cisco Oil Mill is Appellant and the Texas & Pacific Railway Company is Appellee.

Witness my hand and the seal of said Court at Fort Worth, Texas, this the 6th day of July, 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk*.

122 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the state in which a decision could be had in the said suit between the Cisco Oil Mill, a corporation, and the Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, and manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, could be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment

be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United
123 States, together with this writ, so that you have the same at Washington on the 13 day of July, 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14 day of June, in the year of our Lord, 1905.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.]

J. H. FINKS, *Clerk*,
By J. B. FINKS,
Deputy Clerk United States Circuit Court for the Northern District of Texas.

Allowed by
T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

123½ [Endorsed:] In the Court of Civil Appeals for the Second Supreme Judicial District of Texas. Texas & Pacific Railway Company (Plaintiff in Error) *vs.* Cisco Oil Mill (Defendant in Error). Writ of Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, Jun. 14, 1905. W. C. Strong, Clerk.

124 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CISCO OIL MILL, Defendant in Error.

Citation in Error.

United States of America to Cisco Oil Mill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, wherein the Texas & Pacific Railway Company, a corporation, is plaintiff in error, and you are defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, this the 14 day of June, in the year of our Lord, One Thousand Nine Hundred and Five.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Copy of the within citation served this the 14 day of June, 1905, at the office of the Cisco Oil Mill, in the City of Cisco, in the State of Texas.

J. J. BUTTS,
Att'y for Cisco Oil Mill, Defendant in Error.

124½ [Endorsed:] In the Court of Civil Appeals for the Second Supreme Judicial District of Texas. Texas & Pacific Railway Company, (plaintiff in Error) *vs.* Cisco Oil Mill (Defendant in Error). Citation in Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas. Jun. 14, 1905. W. C. Strong, Clerk.

125 I, W. C. Strong, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, do hereby certify that the above and foregoing 124 pages contain a true and correct transcript and copy of the record, assignments of error, and all other proceedings in cause No. 4618 wherein the Cisco Oil Mill is Appellant and the Texas & Pacific Railway Company is Appellee, had in said court as fully as the same remain on file and of record in my office at Fort Worth, Texas, except that the Original Writ of Error and Citation in Error are herewith transmitted with this transcript. And I further certify that the said transcript was made up under the stipulations and directions of the parties thereto.

Witness my hand and the seal of said Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, this the 6th day of July, 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk.*

Endorsed on cover: File No. 19,845. Texas court of civil appeals, 2d supreme judicial district. Term No. 79. The Texas & Pacific Railway Company, plaintiff in error, *vs.* The Cisco Oil Mill. Filed July 13th, 1905. File No. 19,845.

FILE COPY.

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FILED.
OCT 29 1906
JAMES H. McKENN
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Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 79.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE CISCO OIL MILL,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
THOMAS J. FREEMAN,
Counsel for the Texas & Pacific Railway Company.

J. G. Hauser, "The Legal Printer," 402 Camp St., N. O., La.

Supreme Court of the United States

OCTOBER TERM, 1906.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE CISCO OIL MILL,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

The original petition in this suit was filed in the District Court of Eastland County, Texas, on the 18th day of September, 1903, and on the 19th day of February, 1904, an amended petition was filed, the amended petition taking the place of the original petition under the Texas practice. The cause of action, as stated in said amended petition, was in substance as follows:

That, in September, 1901, the defendant in error purchased a large amount of cottonseed at various-named

places in the State of Louisiana, and shipped said seed from said Louisiana points consigned to the defendant in error at Cisco, in the State of Texas; that said seed was shipped to the defendant in error at Cisco, Texas, over the line of road of the Texas & Pacific Railway Company, which operates a line of road from New Orleans, in the State of Louisiana, to El Paso, in the State of Texas, Cisco being a point intermediate and situated in the State of Texas. It was further alleged in substance, in said amended petition, that a reasonable rate from the points named in Louisiana to Cisco, Texas, was a rate of thirty cents per hundred pounds, but that the plaintiff in error, the Texas & Pacific Railway Company, charged and collected for the transportation of the said seed a rate of sixty-seven cents per hundred pounds. It was further alleged that said sixty-seven cents per hundred pounds was unreasonable, but that the defendant in error was required to pay same in order to get possession of the seed; and it sues for the difference between the alleged reasonable rate of thirty cents per hundred pounds and the alleged unreasonable rate of sixty-seven cents per hundred pounds which was charged and collected by the plaintiff in error, the difference in the amount being the sum of $641.69; and, in addition, the defendant in error sued for the sum of $250 as attorney's fees. (Record, pp. 1 to 14.)

Plaintiff in error answered by special exception, in substance, to the effect that it appeared from defendant in error's first amended petition that the shipments of

cottonseed were interstate shipments, and were subject to and made under the provisions of the Interstate Commerce Act only, and that defendant in error's cause of action, if any it had, arose under and by virtue of the Act to Regulate Commerce, known as the "Interstate Commerce Law," and that, if defendant in error had any cause of action, same could only be prosecuted in some United States Court of competent jurisdiction, and not in a State Court, or by proper complaint filed before the Interstate Commerce Commission of the United States. Plaintiff in error also answered by general demurrer and general denial and by special answer, in substance as follows: That at the time, and prior to the time, of the shipments as alleged in defendant in error's first amended original petition, plaintiff in error had promulgated, published and posted its schedule of rates, wherein and whereby it adopted, published and posted the rate provided for transporting and carrying cottonseed in carload quantities, subject to minimum rates from the points mentioned in defendant in error's petition, to Cisco, Texas, and that said schedule of rates published and posted by plaintiff in error, in accordance with the provisions of the Interstate Commerce Act, from said points to Cisco, Texas, was sixty-seven cents per hundred pounds, and was a through rate adopted and posted by the plaintiff in error in accordance with the provisions of the Interstate Commerce Law; that the shipments described in defendant in error's first amended original petition were interstate shipments; that, having filed,

published and posted said rates in accordance with the Interstate Commerce Law, plaintiff in error was not authorized to, and could not in accordance with the law, legally demand or collect from defendant in error a greater or lesser rate for the transportation of said cottonseed than the sum of sixty-seven cents per hundred pounds, as was provided in the schedule of rates adopted, published and posted in accordance with the Interstate Commerce Law; that said sixty-seven-cent rate was filed, published and posted in accordance with the provisions of the Interstate Commerce Law prior to the time of the shipments made by the defendant in error, as alleged in its first amended original petition, and was in full force and effect, and no other rate than the sixty-seven cents per hundred pounds could have been charged for the transportation of said cottonseed, and the sixty-seven-cent rate was the legal rate in effect for the transportation of said cottonseed, and no other rate. It further denied that said rate was exorbitant or unreasonable. (Record, pp. 14 to 19.) The case was tried by the Court without a jury, and on February 20, 1904, the Court rendered judgment in favor of the plaintiff in error. (Record, p. 20.)

After its finding of fact, the Court found the following conclusions of law:

1. That the several shipments of cottonseed referred to in plaintiff's petition were interstate shipments, and that the freight rates and freight charges thereon are governed by the Interstate Commerce Act of the Congress of the United States.

2. That, by the filing of the schedule of freight rates and classifications of freights referred to in Section No. 5 of the findings of fact, and furnishing copies of the same to the freight office at Cisco, and sending the same to the other freight offices, the cottonseed so shipped by the defendant was subject to the tariff rates of sixty-seven cents per hundred pounds, under the provisions of the Interstate Commerce Act.

3. That the thirty cents per hundred pounds would have been a reasonable freight rate on such shipments of cottonseed, and the charge of sixty-seven cents per hundred pounds was excessive and unreasonable; but, under the terms of the interstate law and the printed schedule filed, the defendant could not have charged lawfully any other rate than sixty-seven cents per hundred pounds.

4. The plaintiff is precluded from a recovery herein by the terms and provisions of the Interstate Act of the United States Congress, and its schedule of the rates then filed with the Interstate Commerce Commission.

Judgment was accordingly entered in favor of plaintiff in error.

The defendant in error filed its appeal bond and statement of facts in due time, and the case was regularly appealed to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. The case came on regularly to be heard in the Court of Civil Appeals, which Court on the 25th day of February, 1905, handed down its opinion, reversing the judgment of the

District Court of Eastland County, Texas, and rendering judgment in favor of the defendant in error, and against this plaintiff in error, for the sum of $641.69, with legal interest from October 3, 1901, and all costs. The plaintiff in error filed its motion for rehearing in said Court of Civil Appeals, which motion in due course was overruled, and the plaintiff in error, within the time required by law, made its application for writ of error to the Supreme Court of the State of Texas, which writ of error was refused. From the judgment of the Court of Civil Appeals, it being the highest Court to which this cause could be taken, the Texas & Pacific Railway Company has sued out its writ of error to this Court.

Assignments of Error.

1.

The allegations in the petition filed in the District Court of Eastland County, Texas, by the defendant in error, the Cisco Oil Mill, and the testimony offered on the trial of said cause, showed that the shipment of cottonseed was made over the line of the Texas & Pacific Railway Company from certain points in the State of Louisiana to a point in the State of Texas, and that same was an interstate shipment; and it, therefore, followed that any suit to recover damages on account of any excessive, unreasonable or unjust freight charge made and collected by the Texas & Pacific Railway Company for the transportation of said shipment was wholly

within the jurisdiction of a District or Circuit Court of the United States, and that the District Court of Eastland County, Texas, had no jurisdiction to hear and determine said cause. The said Court of Civil Appeals erred in reversing the judgment and decree of the District Court of Eastland County, Texas, rendered in said cause, and in proceeding to render judgment against this plaintiff in error, the Texas & Pacific Railway Company.

2.

The said Court of Civil Appeals erred in refusing to sustain the first cross-assignment of error presented to it by this plaintiff in error, and in approving the action of the trial Court, wherein said trial Court overruled the plea to the jurisdiction urged by this plaintiff in error, which said plea was to the effect that the District Court of Eastland County was without jurisdiction to hear and determine any suit or claim for damages involving the shipment described in petition of said Cisco Oil Mill, filed in said cause.

3.

Upon the trial of said cause in the District Court of Eastland County, Texas, the Texas & Pacific Railway Company, plaintiff in error, presented and urged a general exception to the allegations in plaintiff's petition, based upon the ground that the allegations contained in the petition of the Cisco Oil Mill showed that said District Court of Eastland County was without jurisdiction

to hear and determine the issues therein involved, which said exception was overruled by the trial Court, and upon appeal said action of the Court was assigned as error by the said Texas & Pacific Railway Company, as will apper from the second cross-assignment of error presented to said Court of Civil Appeals. It says that the said Court of Civil Appeals erred in failing to sustain said cross-assignment of error, and in proceeding to render a judgment against this plaintiff in error.

4.

The said Court of Civil Appeals erred in adopting the conclusions of fact found by the trial Court, and in rendering a judgment against this plaintiff in error, which action was erroneous, in that said trial Court held that the freight charges collected and received were unreasonable and excessive, when in fact there was no evidence to sustain such finding and judgment of the Court.

5.

The trial Court held that the Texas & Pacific Railway Company had complied with the terms and provisions of the act of Congress of February 4, 1887, entitled an "Act to Regulate Commerce," and known as the "Interstate Commerce Act," with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit; and further held, as a conclusion of law, that the Texas & Pacific Railway Company was entitled to collect and receive the amount as shown by

this tariff rate—to wit, sixty-seven cents per hundred pounds. It says that the Court of Civil Appeals erred in not sustaining the holding of the said trial Court in this respect, and in rendering a judgment against this plaintiff in error, based upon a freight rate lower than that fixed by the said published tariff rate.

6.

It says that the judgment of the said Court of Civil Appeals is repugnant and in conflict with the laws of the United States, and especially with those several acts of Congress of the United States commonly known as an "Act to Regulate Commerce," approved February 4, 1887, and acts amendatory thereto, especially Sections 8 and 9 of said act, approved February 4, 1887.

7.

The said Court of Civil Appeals erred in reversing the judgment of the District Court of Eastland County, and in rendering a judgment against this plaintiff in error, because said judgment of the said Court of Civil Appeals is repugnant to, and in conflict with, and is contrary to, and in violation of, and in contravention with, the statutes of the United States with reference to the regulation of interstate commerce and provisions therein claimed.

8.

The said Court of Civil Appeals erred in rendering any judgment herein against plaintiff in error, because

there were drawn into question the construction and application of the statute of the United States under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the said Court of Civil Appeals was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

9.

The said Court of Civil Appeals erred in holding that, although the regular published tariff rate, under the terms and provisions of the Interstate Commerce Act, was sixty-seven cents per hundred pounds, and which amount the said plaintiff in error collected, yet that said Court, as well as the District Court of Eastland County, had the jurisdiction and power to set aside said regular published tariff rate, and to hold that same was unreasonable and unjust, and to hear and determine what was a reasonable and just rate to be charged, and to render a judgment for any unreasonable and excessive amount charged and collected.

10.

The interpretation placed on the Interstate Commerce Act by the Court of Civil Appeals for the Second Supreme Judicial District of Texas is contrary to, in violation of, and in contravention with, the statutes of the United States as to the regulation of interstate commerce.

BRIEF.

There are two Federal questions raised in this case, both of which were specially set up and claimed by the Texas & Pacific Railway Company in the Court below, as fully appears in the record. (See Answer of the Texas & Pacific Railway Company, Record, pp. 6, 7 and 8, setting up its alleged rights under the Interstate Commerce Act.) One of these Federal questions is to the effect that the defendant in error's cause of action, if any it had, exists by virtue of a law of the United States—to wit, the Interstate Commerce Act of Congress—entitled "An Act to Regulate Commerce," approved February 4, 1887, and that, by the terms of said act, a cause of action such as is alleged by the defendant in error could only be enforced in the United States Courts having jurisdiction, or before the Interstate Commerce Commission, as provided by said Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that such a cause of action as defendant in error alleged in his petition could not be maintained in a State Court. This question was decided against the plaintiff in error.

The second Federal question was to the effect that the only lawful rate that the plaintiff in error could charge for transporting the cottonseed was that set forth in its duly-filed, published and posted tariff in accordance with the Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that this rate was sixty-seven cents, and was the rate charged, and the only lawful rate that could be charged, by the

plaintiff in error. This question was raised and decided against the plaintiff in error by the Court of Civil Appeals. The said judgment of the said Court of Civil Appeals was and is the final judgment of the highest Court in the State in which a decision in this case can be had; that said decision of the Court of Civil Appeals is repugnant to, and in conflict with, the laws of the United States and the Interstate Commerce Act, and especially Section 8 and Section 9 of the said Act to Regulate Commerce, approved February 4, 1887, and amendments thereto. The plaintiff in error claimed title, right and immunity under and by virtue of the said act, and there were drawn into question the construction and application of the said acts, and the decision of the said Court of Civil Appeals was against the right, title and immunity claimed thereunder.

There is no disputed question of fact in the record. The facts as alleged in plaintiff in error's answer were found to be true, both by the District Court of Eastland County and by the Court of Civil Appeals for the Second Supreme Judicial District. (See Record, pp. 28 and 57-58.)

There are two questions involved in this case as before set out:

1. Could the defendant in error maintain a suit of this kind in the State Courts?

2. Does a cause of action lie against a railway company for the difference between the legal rate printed, published and posted in accordance with the provisions of the Interstate Commerce Act and a lower rate alleged to be a reasonable rate by a shipper of interstate

freight, the lower rate not having been printed, published and posted in accordance with the Interstate Commerce Act, but to be determined by the judgment of a State Court?

We submit the following propositions of law as decisive of the first question raised:

If an Act of Congress gives a right to a party aggrieved without specifying a remedy, it might be enforced in a State Court; but, if a right is conferred by statute, and a specific remedy provided, or a new power and means of execution granted, the right can be enforced only in the mode provided in the act.

2. A party who seeks damages alleged to have been sustained in consequence of the violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal Court, cannot bring suit in a State Court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or the Federal Court. Otherwise, the party would have a third alternative or mode of redress not contemplated by the act. He is restricted to one of two remedies.

3a. Where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction.

3b. When a right is given by statute, and a specific remedy provided, or a new power, and also the means of execution, the power can be executed and the right vindicated in no other way than that prescribed by the act.

3c. The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal Courts or before the Interstate Commerce Commission, but not in both, by a necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement.

Authorities under above propositions:

Interstate Commerce Act, February 4, 1887, 1 Supp. to R. S., p. 529, and amendments thereto, especially Secs. 8 and 9.
Frank T. Copp vs. L. N. R. R. Co., 43 La. 511-514.
G. C. & S. F. vs. Moore, 83 S. W. 362.
Van Patten vs. Chicago, M. & St. P., 74 Fed. 981.
Ex Parte McNeil, 13 Wallace, 236.
Gilman vs. Philadelphia, 3 Wallace, 713.
Swift sv. Philadelphia R. R. Co., 58 Fed. 858.
Claflin vs. Houseman, 93 U. S. 130, see p. 137.
The Moses Taylor, 4 Wallace, 411, 425 to 431 for opinion.
Story on the Constitution, Secs. 436-447.

We submit the following propositions of law as decisive of the second question raised:

The only lawful rate that can be charged and collected by a common carrier upon an interstate shipment is the legally-filed, published and posted rate under the Act to Regulate Commerce, and no cause of action for damages or otherwise will lie against a carrier for collecting its duly-published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in Section 9 of the Interstate Commerce Act. By the terms of the Interstate Commerce Act, it is illegal for either a corporation or person to give or receive any

rebate, concession, etc., and declaring same to be unlawful, and the person or corporation so doing to be guilty of a misdemeanor. By Sections 6 and 10 of the original act, and by the Elkins amendment to the Interstate Commerce Act, approved February 19, 1903, it is provided that it shall be a misdemeanor and unlawful, punishable by a fine, for any person, persons or corporations to grant, give or solicit, accept or receive, any rebate or concession in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereof.

Authorities:

Texas & Pacific Ry. Co. vs. Mugg & Dryden, 202 U. S. 242.

Hefley vs. Railway Co., 158 U. S. 98.

Southern Ry. vs. Harrison, 119 Alabama, 539.

M. K. & T. Ry. Co. vs. Trinity Lumber Co., 1 Tex. Civ. Appeals, 553.

Texas & Pacific Ry. Co. vs. Clark, 4 Tex. Civ. Appeals, 611.

M. K. & T. Ry. Co. vs. Stoner, 5 Tex. Civ. Appeals, 50.

Dillingham, etc., vs. Fischel, 1 Tex. Civ. Appeals, 546.

S. A. & A. P. Ry. Co. vs. Clements, 20 Tex. Civ. Appeals, 498.

Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887. 1st U. S. Statutes, 529, and amendments thereto, especially Secs. 6 and 10.

ARGUMENT.

Under the first proposition of law—to the effect that the State Courts have no jurisdiction to entertain a suit of this character—we respectfully submit that this is a question of more than passing interest; that the decision of same goes to the very foundation of the Act to Regulate Commerce, known as the "Interstate Commerce Act"; that, should this Court hold that a suit of this nature could be maintained in the various courts of the States, the practical effect of such a decision would be to annul and make inoperative the principal features of the Act to Regulate Commerce, and, so far as the practical workings of the Act to Regulate Commerce are concerned, it would render it nugatory and of no effect. The Act of February 4, 1887, known as the "Interstate Commerce Act.," and the amendments thereto, had in view, not the regulation of interstate commerce in a general way, but the specific purpose of regulating the rates, rules and fares that should govern the movement of interstate commerce, and the act treats the subject of such regulation as a whole and has attempted to cover the entire field of such regulation. It provides, in express terms, as to what common carriers shall come within the purview of the act, and it then, in express terms, adopts as a part of the act, and practically adopts as a rule upon which the other provisions are based, the rule of the common law in effect as to compensation for services rendered by common

carriers in the transportation of property. The last paragraph of Section 1 of the act provides as follows:

> "All charges made for any service rendered, or to be rendered, in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

This is but an enunciation of the common law as applied to the transportation of passengers and property by common carriers. The act then further provides for the filing, publishing and posting of the rates, fares and charges of the common carrier, and provides that such filing, publishing and posting shall be necessary in order to make the rates on interstate commerce lawful. The only rates that can be legally charged by a common carrier for transporting interstate commerce are those that have been filed, published and posted in accordance with the Act to Regulate Commerce, and a severe penalty is provided under the original act. (See Section 10 of the Act to Regulate Commerce, approved February 4, 1887, as amended in 1889, and the Elkins amendment to said original act, approved February 19, 1903, which last act was amended by the last Congress, the amendment taking effect of July 29, 1906.) Both the original Interstate Commerce Act and the amendments thereto provide in detail what the carrier must do in order to make its rates, fares and charges legal. But both the act and the amendments

thereto, after providing as to how a legal and lawful rate may be made by the carrier, do not leave the shipper or the public without a remedy to enforce the common-law rule adopted in the act—that such rates, fares and charges shall be reasonable and just. The act itself makes express provisions for relief against an unreasonable or unjust rate, and by express terms it provides the means, and names the court and tribunal that may be resorted to by the shipper should he be dissatisfied with the rates, fares and charges that have been legally published, posted and filed by the railway company, and provides the means and the Court to test the reasonableness of such rates, fares and charges. Sections 8 and 9 of the Act of February 4, 1887, give to the shipper the right to attack any rate or fare for unreasonableness, and provides two tribunals, in either of which he may attack the rates, fares and charges as unjust and unreasonable. If he elects, he may bring suit to attack the unreasonableness of a rate, and for damages on account of being charged an unreasonable rate, in a Federal Court of competent jurisdiction, and this, too, regardless of the amount in controversy. If he does not elect to sue for his damages in a Federal Court on the ground of the rate being unreasonable, he may file his complaint before the Interstate Commerce Commission, and attack the rate as unreasonable; and, upon the finding of the Interstate Commerce Commission that the rate is unreasonable, a suit could be instituted upon the equity side of the docket of the Federal Court to enjoin the carrier from further charging such unreasonable rate.

In addition thereto, the Commission could indicate in their report that the shipper was entitled to a fixed amount in reparation for his damages on account of the unreasonable rate, and the shipper could institute suit in a Federal Court of competent jurisdiction to enforce this finding of the Commission. The law, Section 9, expressly prohibits, however, the shipper from exercising both remedies, but forces him to elect as to which of the remedies he would resort to, and in both instances expressly fixes and provides the forum or tribunal in which his right must be asserted. Since the amendment of June 28, 1906, in the event of complaint to the Commission of the unreasonableness of a rate, the Commission, in addition to awarding him damages, could also fix by its order a rate to be charged by the carrier in the future, which the carrier would be forced to comply with, or else enjoin same in the Federal Court. It can be seen from these provisions that the entire question of regulation of rates has been dealt with in detail. The rights of the shipper, the remedies of the shipper, the rights of the railway, and the remedies of the railway, and the rights of the general public, are all fully provided for and fully protected. The entire Interstate Commerce Act shows a perfect and complete plan in itself, and it is clearly not intended by the act that any of its provisions should be dependent upon the rule provided by any State statute or by a rule or decision that might be laid down by any State Court. The act, by express provisions and by necessary implications, deprives the State Courts of any juris-

diction to grant relief or to adjudicate the questions that might arise under and by virtue of the Act to Regulate Commerce, known as the "Interstate Commerce Act," and expressly deprives the State Courts of any jurisdiction, or right to adjudicate and establish what is a reasonable and just charge for transporting interstate commerce; and the wisdom of the law is apparent upon its face, for, if this were not true, what a chaotic condition of affairs would exist! One shipper of interstate commerce in Texas might obtain a verdict of a jury, or a Justice of the Peace, to the effect that the legally-published, posted and filed rates on an interstate shipment were unreasonable. The Interstate Commerce Commission, at the instance of another shipper, might hold it reasonable, or a Federal Court might hold it reasonable. Or a Justice of the Peace in one county, or in one precinct, might hold a rate reasonable, while another Justice of the Peace, in the same county and in the same precinct, might hold it unreasonable, so that the reasonableness or unreasonableness of the legally-published rates on interstate commerce would depend upon the whim of a jury or Justice of the Peace. To further illustrate the unjustness of such a situation, I would call attention to the fact that, in the State of Texas, no appeal lies from a suit in a Justice's Court where the amount involved is less than $20. (Revised Statutes of Texas 1895, Article 1568 and Article 1158.) No appeal will lie from the County Court, in the State of Texas, unless the amount in controversy, or the judgment rendered, shall exceed $100, exclusive of interest

and costs. (Revised Statutes 1895, Article 996.) The officers who preside over the County and Justice's Courts in Texas are not required by the Constitution and laws of the State to be learned in the law, and the Supreme Court of Texas has held that no presumption would arise, in cases tried before Justices of the Peace or the County Court, where the amount was too small to appeal, that the law had not been correctly applied. (See *Railway vs. Dowe,* 70 Tex., pp. 6 and 10.) And yet, if this Court should hold that the State Courts have jurisdiction to try the question of the reasonableness or unreasonableness of interstate rates put in effect by the carriers under the Act to Regulate Commerce, these very Courts would be the ones that would try most of the cases, and no writ of error would lie to any Federal Court, for no Federal question exists, as they claim jurisdiction under the common law, not the Federal statute. This state of affairs was never contemplated by the act, and we submit that every expression and every implication is against it. The learned Court of Civil Appeals seems to have given some weight to the provision of Section 22 of the Interstate Commerce Act, which is as follows:

> "Nothing in this act contained shall alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

We submit that it was not the intention of this provision to confer jurisdiction upon State Courts to enforce the provisions of the act, because the act specifically pro-

vides the Courts in which rights arising under the act shall be enforced; but this paragraph is merely an announcement that whatever remedies that may have existed, either at common law or statute, might be resorted to to carry out the provisions of this act, and were not repealed by it. The Interstate Commerce Act prevents pooling by one provision—Section 7. It was not intended that the general statute of the United States, prohibiting unlawful combinations by pools or otherwise, should be repealed or interfered with in any way, nor the right to resort to injunction if necessary, nor the right to resort to any other remedy for wrongs or evils not specified or covered by the act; but in the matter of attacking a rate as unreasonable, and in seeking damages therefor, the act is specific, and has provided a specific forum and tribunal. The next provision following the provision above quoted expressly confers upon the District and Circuit Courts of the United States jurisdiction for a violation of the law. The vice in the opinion of the Court of Civil Appeals of Texas in this case, and in the companion case of the *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company,* being Cause No. 78, is that the Court did not consider the fact that no new right was created by the Interstate Commerce Act in the shipper to sue for an unreasonable rate, but his right by the common law was embodied in a law of the United States, and a means and a Court for its enforcement provided; and whether or not the common law was in effect in the United States was of no importance whatever, for the reason that the Interstate

Commerce Act itself expressly adopted the rule of the common law, and has expressly provided that, in this class of cases, jurisdiction is confined exclusively to the Courts of the United States. If no provision had been made in the act for its enforcement in Courts of the United States, then there would have been some ground for the Court of Civil Appeals holding that it was a right that could be enforced in any court, State or Federal, because there is no provision in the Constitution of the United States, nor in the laws made in pursuance thereof, prohibiting State Courts entertaining jurisdiction over matters arising out of interstate commerce; but, when a statute of the United States specifically provides the Court in which the right may be enforced, this is to the exclusion of the right to enforce the remedy in a State Court, and this is the distinction that the Court of Civil Appeals did not make. The very decisions upon which it relies to support its opinion —to wit, 62 Federal Reporter, 24—expressly recognizes the rule announced above. The case of *Tift vs. Southern Ry.*, 123 Federal Reporter, 790, recognizes the rule as announced above. The case of *Interstate Commerce Com. vs. N. O. & T. & P. Ry.*, 167 U. S. 502, relied upon by the Court of Civil Appeals, is a direct authority in favor of the views of the plaintiff in error in this case. On page 505, in summing up the provisions of the Interstate Commerce Act, the learned Judge says:

> "3. Incorporating into a situation the common-law obligation resting upon the carrier to make all of its rates reasonable and just and directing the Commission to execute the provisions of the act," etc.,

showing that this Honorable Court has recognized that the common-law provision has been embodied in the statute. There is no contention upon the part of the plaintiff in error that the common-law provision has not been embodied in the statute, but there is a grave distinction between the embodying of the common-law provision in the statute, and making the common law effective in the United States, and the giving to State Courts jurisdiction to enforce the rights conferred under the Interstate Commerce Act; and the learned Court of Civil Appeals failed to make the distinction between the jurisdiction of a State Court to enforce the common law and the question of a common-law right existing.

We earnestly submit that the Court of Civil Appeals erred in holding that the rights sought to be enforced in this suit could be enforced in a State Court, and this view is supported by the authorities cited in this brief.

As to the second proposition of law involved in the assignments of error—to the effect that no cause of action would lie against the plaintiff in error in a suit of this character, for the reason that the admitted facts show that the rate as charged by the plaintiff in error was the duly-published, posted and filed rate in accordance with the Interstate Commerce Act—we beg to submit that this is a question that is no longer open to discussion, as the identical question was decided by this Honorable Court in the case of *Texas & Pacific Railway Company vs. Mugg & Dryden,* 202 U. S. 242, this Court holding that the legally-published, posted and filed rate of the carrier on interstate

shipments must be charged and collected, and that no agreement or arrangement or contract to the contrary would relieve it of this duty, and that no cause of action, either in contract or damages, would lie against it for having complied with its duty in this respect. As before stated herein, the shipper had his remedy, which he could have asserted either in a court of competent jurisdiction—to wit, a Federal Court—or before the Interstate Commerce Commission.

For the errors assigned, we respectfully ask that the judgment of the Court of Civil Appeals be reversed and the cause remanded, with instructions to enter judgment in behalf of the Texas and Pacific Railway Company.

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THOMAS J. FREEMAN,
Counsel for the Texas & Pacific Railway Company.

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(19,845.)

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 79.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE CISCO OIL MILL,

Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

Brief for Defendant in Error.

J. J. BUTTS,

Counsel for Defendant in Error.

Cisco Apert Print

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Brief for Defendant in Error.

Abstract of the Case.

Counsel for defendant in error has not a copy of the brief for plaintiff in error before him; he assumes, however, that the statement of the case made in the brief is full and fair; nevertheless, he submits the following as a brief abstract of the case.

Defendant in error brought this action against plaintiff in error in the district court of Eastland county, Texas, for the recovery of the sum of $641.69, alleged over-charge on four car

loads of cotton seed shipped from Moreauville and Cottonport, in the State of Louisiana, to Cisco, in the State of Texas, alleging, among other things, that the freight charged and collected of and from defendant was unreasonable and excessive. (Printed Record, pp. 2–4). To the cause of action set out in the petition of defendant in error, plaintiff in error interposed in the trial court, INTER ALIA, (1) a plea to the jurisdiction of the court, alleging the shipments complained of were inter-state; that the damages, if any, were a consequence of a violation of the inter-state commerce law, and that the Federal Court alone had jurisdiction to hear and determine the controversy; (2) a special exception to the allegations made and contained in the petition of defendant in error, urging want of jurisdiction in the state court. (Printed Record pp. 14–15.); a special exception, excepting to so much of the petition of defendant in error as prayed for attorney's fee. (Printed Record p. 17.) (3), a general denial, and (4) a special answer setting up the fact that the shipments complained of were interstate; that plaintiff in error had, prior to the said shipments, promulgated, published and posted schedules of freight rates, showing the rate on cotton seed between the points of shipment and destination to be 67 cents per 100 pounds; that this schedule had been duly filed with the Interstate Commerce Commission and that it would have been unlawful for it to have charged a less freight rate than that shown by the printed, published and posted schedule. (Printed Record, pp. 18–19.)

The trial court overruled the plea to the jurisdiction of the court, and all exceptions of defendant in error, except the one numbered 6½ urged to so much of the petition of defendant in error as prayed for attorney's fees. (Judgment of the trial court, printed record, pp. 20–21.)

The cause was tried before the court without the intervention of a jury, and resulted in a judgment in favor of plaintiff in error. (Printed record, p. 21.)

The trial court filed conclusions of law and of fact. (Printed record pp. 28–31.)

Defendant in error prosecuted an appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the judgment of the trial court was reversed and judgment rendered in favor of defendant in error. (Printed record, p. 59.) Plaintiff in error filed a motion for rehearing (Printed record pp. 60–63), which was, by the Court of Civil Appeals, overruled;

(Printed record p. 63;) plaintiff in error filed a petition for writ of error, (Printed record, pp. 63–67), which was granted [Printed record p. 67;] filed assignment of error, [Printed record pp. 70–73] and brings the cause to this Court for review.

The plaintiff in error, by its assignments of error to the proceedings, decision and judgment of the Court of Civil Appeals, presents two questions to this Court for consideration: 1. It challenges the jurisdiction of the state court to hear and determine the controversy; and 2. Complains of the conclusion of fact by district court, finding and holding that the freight rate charged defendant in error was unreasonable and excessive, which conclusion of fact was adopted by the Court of Civil Appeals.

Taking these propositions in their inverse order, we deem it sufficient answer to the contention of plaintiff in error calling in question the correctness of the conclusion of fact complained of, to direct this Court's attention to the fact that the "conclusion" complained of was a finding of fact by the district court, which was adopted by the Court of Civil Appeals; and, on error to the latter court, this finding of fact is conclusive on this Court. Such has been the ruling of this Court from the beginning, and is no longer an open question.

Chrisman vs. Miller, 197 U. S., 312, 319.

Jenkins vs. Neff, 186 U. S., 230, 234 235.

Hendricks vs. A. T. & S. F. R. R. Co., 167 U. S., 673, 677.

Republican River Bridge Co. vs. Kansas P. R. Co., 92 U. S., 315.

Egan vs. Hart, 165 U. S., 189.

But were the ruling of this court on the proposition to the contrary, plaintiff in error is precluded from urging this question in his forum, because of its failure to urge it in the Court of Civil Appeals. [Opinion Court of Civil Appeals. Printed, Record p. 58.]

JURISDICTION OF STATE COURTS.

Plaintiff in error challenged the jurisdiction of the district court by a plea to the jurisdiction of that court; and special exceptions 3 and 4. Following are copies of its plea to the jurisdiction of the district court, and of its special exceptions presenting this question:

PLEA TO JURISDICTION.

"Now comes the defendant, The Texas & Pacific Railway Company, and for answer in this behalf says:

[1] It plainly appears from plaintiff's first amended original petition, filed herein on day of 1904, that shipments in controversy are interstate shipments; that said shipments originated in the state of Louisiana at the towns Moreauville and Cottonport; that the destination of the cotton seed involved in each shipment in controversy was Cisco, Texas; that it plainly appears from plaintiff's said first amended original petition that said shipments were subject to, and were made under, the provisions and regulations of the interstate commission act only; and that said shipments were and are subject to the act of Congress and that the terms and provisions of the Federal Statute relating to and regulating the transportation of commerce from one state into another, and across and through another state, other than the origination of said shipments, and the controversy in this case arises under the law of the United States relating to a subject matter over which Congress has exclusive control; that, by the terms of said Federal Statute a party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the interstate commerce law AS REGULATED exclusively to the Commission or the Federal Court; in other words, a party who seeks damages alleged to have been sustained in consequence of a violation of said interstate commerce law, because of the commission of any act on the part of a common carrier, must bring his cause of action, if any he has, in some Federal Court of competent jurisdiction, or by proper complaint filed with and properly prosecuted before said Interstate Commerce Commission. This defendant further says and alleges that this court is without jurisdiction to hear and determine the rights of the plaintiff and the cause of action alleged and sought to be maintained against this defendant by the plaintiff in this cause," etc., etc. [Printed Record pp. 14 15].

SPECIAL EXCEPTION No. 3.

"For special exception herein defendant says plaintiff's first amended original petition herein filed is insufficient in law for plaintiff to have and maintain this or any other cause of action upon the allegations therein contained, because it plainly appears from the face and the allegations contained in said first amended original petition that plaintiff, if any cause of action

he has against this defendant, can only prosecute and maintain the same in some Federal Court of competent jurisdiction, or by proper complaint filed with, and properly prosecuted before, the Interstate Commerce Commission of the United States of America, etc., etc."

SPECIAL EXCEPTION No. 4.

"For futher special exception to plaintiff's first amended original petition filed herein this defendant says said petition is insufficent in law, [1] because it plainly appears from the face and allegations of said petition that plaintiff, if any cause of action it has, is seeking to recover damages from this defendant because of the charge and collection of a freight and tariff rate charged and collected by this defendant from plaintiff in contravention of the provisions of the interstate commerce law; [2] because it does not appear from the allegations contained in plaintiff's said first amended original petition that this defendant demanded or collected any sum or sums of money, or any rate or rates, not provided and contained in its schedule or rate filed before the Interstate Commerce Commission of the United States of America; [3] because it does not appear from the said petition and the allegations therein contained that this defendant demanded or collected from plaintiff as compensation for the transportation of the cotton seed mentioned in plaintiff's petition, any sum or sums of money in excess of the amount it was entitled and compelled to collect and demand from plaintiff for the transportation of said cotton seed from the point of origination to the point of destination, as provided by its schedule of rate on file with the Interstate Commerce Commission of the United States of America, and in force and effect at the time of said shipments, etc." [Printed Record pp. 15-16]

From a casual reading of the plea to the jurisdiction of the state court interposed by the plaintiff in error in the district court, and its special exceptions challenging the jurisdiction of that court, quoted above, it is manifest that the plaintiff in error labored, and is still laboring under the impression that defendant in error bases its cause of action upon the violation of some provision of the Interstate Commerce Act by the plaintiff in error, or, that the allegations in the first amended original petition of defendant in error show a compliance with the terms and provisions of the Interstate Commerce Act by the plaintiff in error prior to the time of the shipments in controversy. The

Court of Civil Appeals fell into a similar error. (See its opinion, Printed Record pp. 57–58.)

But the fact is, that defendant in error bases its right of action on the common law governing and controlling common carriers in respect to their charges for transportation of freight, and is pursuing a common law remedy. It neither alleges a violation of any provision of the Interstate Commerce Act; nor that plaintiff in error had complied with the provisions thereof prior to the time of the shipments in controversy; nor seeks recovery on account of a violation of any of its terms or provisions by plaintiff in error: That this may more clearly appear, we quote the first count in the first amended original petition of defendant in error, to which the above plea and exceptions were addressed:

"That, at several times hereinafter mentioned and referred to, defendant was, and still is, a common carrier of freight, engaged in the business of carrying and transporting freight for the public for compensation, to and from the aforesaid towns and stations on its said line of railway: and that, as such common carrier, it became, and was, the duty of the defendant to receive, transport and carry freight and products of the kind and character hereinafter mentioned and referred to, when tendered to it at one of its stations, for a fair, just and reasonable compensation; and that it then had, and now has, no legal right to charge demand or receive an unjust, exhorbitant and unreasonable price for carrying and transporting freight.

That, at said several times hereinafter mentioned and referred to, the sum of thirty [30] cents per 100 pounds was a fair, just and reasonable price, charge and compensation for carrying and transporting cotton seed, in car load lots, in bulk, from the aforesaid towns of Moreauville and Cottonport, in the State of Louisiana, to the said city of Cisco, in the State of Texas.

That on to wit: the 20th, 26th and 28th, days of September, 1901, plaintiff had at the said town of Moreauville, in the State of Louisiana, cotton seed in bulk, which it desired to have shipped and transported to the city of Cisco; and that, on each of said dates, the Planters Gin Company, acting for and on behalf of plaintiff, tendered to the defendant, at said town of Moreauville, a car of cotton seed, in bulk, to be shipped, carried and transported to the said city of Cisco, and there to be deliverd to plaintiff, which said three cars of cotton seed the

defendant then and there received and accepted, and executed its three certain bills of lading therefor acknowledging the receipt thereof from the said Planters Gin Compa and promising, agreeing and undertaking to transport and he same to the said city of Cisco, and to there deliver the plaintiff. And that, on to-wit: the 25th day of Sep 1901, plaintiff had a car of cotton seed at the afore own of Cottonport, in the State of Loisiana, which it desired to have shipped, transported and carried to the said city of Cisco, and there to be delivered to plaintiff, which said car of cotton seed was, on the said 25th, day of September, 1901, tendered to the defendant at said town of Cottonport by one Lemoine, who was then and there acting for and on behalf of plaintiff, which defendant then and there received and accepted, and executed and delivered its bill of lading therefor, acknowledging the receipt thereof from the said Lemoine, and promising, agreeing and undertaking to carry and transport the same to said city of Cisco, and there deliver the same to plaintiff; that in said several bills of lading so executed by the defendant, no freight rate on said cotton seed therein specified was named or mentioned; that, by reason of the premises, defendant promised and agreed and undertook to carry and transport said cotton seed from the said towns of Moreauville and Cottonport to the said city of Cisco for a fair, just and reasonable compensation, which plaintiff avers would have been, and was, thirty (30) cents per 100 pounds; that said four cars of cotton seed weighed, respectively, to-wit: 40,530 pounds, 48,200 pounds, 40,090 pounds and 44,610 pounds, aggregating 173,430 pounds.

That, notwithstanding it was the duty of defendant to transport and carry said four cars of cotton seed from said towns of Moreauville and Cottonport to said city of Cisco, for a fair, just and reasonable compensation and charge, and that thirty (30) cents per 100 pounds would have been, and was, a fair, just and reasonable price, charge and compensation for so carrying and transporting the same, when the said four cars of cotton seed arrived at said city of Cisco, defendant demanded of plaintiff the sum of sixty-seven (67) cents per 100 pounds for freight charges thereon; and that plaintiff, in order to get possession of its said four cars of cotton seed, was compelled to pay, and did pay, the sum of sixty-seven (67) cents per hundred pounds thereon; that the amount of unjust, unreasonable, excessive and

unfair freight charges so demanded and collected of and from plaintiff on said four cars of cotton seed aggregated to the amount of, to wit: $641.69, in this: that the total freight charges on said four cars of cotton seed at thirty (30) cents per hundred pounds, which plaintiff avers would have been, and was, a just and reasonable compensation for carrying and transporting the same, and that, at this rate, the total freight charged would have amounted to, to-wit: $520.29, while the defendant demanded, charged and compelled plaintiff to pay to it, freight on said four cars of cotton seed at the rate of sixty-seven (67) cents per 100 pounds, which amounted, in the aggregate, to the sum of, to-wit: $1161.98, which last mentioned sum and amount defendant demanded of and from plaintiff, and required and compelled plaintiff to pay the same before defendant would deliver to plaintiff its said four cars of cotton seed; and that plaintiff was required to pay to defendant said sum of, to wit: $1161.98, before it could get possession of its said cotton seed, the same being paid by plaintiff under protest.

That said of excessive freight so paid to defendant by plaintiff on said four cars of cotton seed was so paid to, and received by, defendant as follows, to-wit: $149 96 on September 28th, $178.34 on September 30th, $148.33 on October 2nd, 1901, and $165.06 on Oct. 3d, 1901." (Printed Record, pp. 2, 3, 4.)

The cause of action is, in some respects, stated differently in other counts, or parts, of the petition; but this is permissable under the system of pleading and practice of Texas. (See Opinion of Court of Civil Appeals in this cause, Printed Record 1. 58) Fowler vs. Stoneum 11 Texas, 511; Taylor Cotton Seed Oil Co. vs. Pumphrey, 32 S. W. Rep., 225.

No where in the petition is the Interstate Commerce Act, or Law, mentioned or referred to.

If any count, or part, of the petition showed a cause of action of which the district court of Texas had jurisdiction, that court did not err in overruling the plea to the jurisdiction and the special exceptions calling into question the jurisdiction of that court, because they were, each and all, addressed to the entire petition. Special exceptions addressed to portions of the petition, possibly, might have been sustained by the trial court and by the Court of Civil Appeals; but as plaintiff in error did not resort to this method of attacking the pleading, it is useless to speculate as to what the result might have been, had this been done; but in any event sufficient allegations would have re-

mained to state a cause of action within the jurisdiction of the state court. It will be observed that the special exception of plaintiff in error attacking that portion of the petition which sought recovery of attorney's fees was sustained by the trial court. (Printed Record p. 21.)

On the question of the jurisdiction of the State courts to hear and determine the controversy involved in this cause, we submit:

1. While it is true that the legislative control of commerce between the states is vested in Congress, it does not thereby follow that state courts may not hear and determine controversies between their citizens, and between their citizens and citizens of other states, growing out of such business and involving Federal laws enacted in pursuance of the constitution by Congress governing the same. Western U. Tel. Co. vs. Call Pub. Co., 181 U. S., 92, 100, 101, 102, 103. Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S. 513, 515, 516.

It is evident that Congress did not, in the enactment of the Interstate Commerce Act, intend to oust the state courts of jurisdiction of such controversies as are here involved; on the other hand, it would seem that the rights of the citizen in respect to his remedies existing at the time of the enactment of that law, were jealously guarded and secured by the Act itself, as will appear from the following quotation from section 22 thereof. " * * * and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." U. S. Compiled Statutes, – p. 3171.

The fact that, by the terms of the Interstate Commerce Law, a right of action is given in the Federal Courts does not raise the presumption that the jurisdiction of the state courts over the subjects therein referred to are excluded. Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S. 513–515.

2. As neither the facts given in evidence on the trial of the cause in the district court, nor the findings of facts by that court, show that plaintiff in error had complied with the terms and provisions of the Interstate Commerce Law, which required common carriers engaged in the transportation of interstate commerce, to plainly print their schedules of interstate freight rates in large type, containing the classification in force, and stating the names of the places upon its railroad between which property will be carried, and to post two copies thereof in conspicuous places in every depot, station or office of such carrier

where freight is received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

There is no evidence in the record showing, or tending to show, that a copy of the schedule offered in evidence on the trial of the cause had ever been posted in any depot; nor did the trial court find as a fact that a copy of it had been posted in any depot, station or office upon the railroad of plaintiff in error where freight is received for transportation. The trial court did find, as a fact, that a copy of the schedule was on file in the depot of plaintiff in error at Cisco, at the time of these shipments. But in paragraph 6 of its findings of fact, (Printed Record p. 30) the court says: "No evidence, however, was offered as to whether or not said books of freight rates and classification were or were not actually on file at Cottonport and Moreauville and the court makes no finding as to that fact." The evidence further showed, and the court found as a fact, "that there was in the the office and possession of defendant's agent at Cisco, a book of tariff rates showing the freight rates to Cisco from the aforesaid points and all other points on said road in La. and showing that the freight tariff from Cottonport and Moreauville to Cisco on freight known as "Class A" was 67 cents per hundred pounds, in car lots, of not less than forty thousand pounds. Said book referred to a book of classifications of freights compiled by the Western Classification Association for information as to how freight was classed, and said book so compiled by the Western Classification Association was also on file in the office of defendant's agent at Cisco, the said book of classification showed cotton seed was listed as "Class A." (Printed Record pp. 29–30.)

G. S. Maxwell, chief clerk in the freight department of defendant in error, testified on the trial of the cause in the district that "an ordinary business man, without any outside information, could not take this tariff sheet (the one introduced in evidence and upon which plaintiff in error relies) without referring to something else, and tell what the rate on cotton seed would be from any point." (Printed Record p. 51.)

Geo. Langston, agent of defendant at Cisco, testified that "an ordinary business man, not familiar with railroad terms and classifications, could not, by inspection of this tariff sheet (the one introduced in evidence and relied upon by plaintiff in error), without reference to any thing else, tell what the freight

rate on cotton seed would be from any point; it would be necessary to refer to the Western Classification to see how it was classed." (Printed Record p. 52.)

Defendant in error contended in the State courts, and still contends, that these facts testified to by the witnesses for the plaintiff in error, and found by the trial court, do not show such a compliance with the provisions of the Interstate Commerce Act as to have made its freight rates on cotton seed effective under that law, and that the case was, and is, governed by the common law of England, which was adopted by Texas in 1840, and was in force in the State at the time of the several shipments complained of. Revised Civil Statutes of Texas, of 1905, Article 3258.

There was no evidence that the schedules of freight rates were plainly printed; the facts showed that they did not contain the classification of freight, reference to an independent publication being necessary to show such classification; that they were so printed and published that an ordinary business man could not determine the freight rate on cotton seed between any two points on the railway line of plaintiff in error, without seeking information ALIUNDE the printed schedules; and there was no evidence whatever showing, or tending to show that the schedules of freight rates so printed by plaintiff in error had ever been posted at, or in, any depot, office or station of plaintiff in error, or any where else. It is true, Mr. Maxwell, the witness for plaintiff in error above referred to, testified that copies of the schedule had been sent to all local agents of the plaintiff in error; (Printed Record p. 51) but the law required them to be posted in two "public and conspicuous places in every depot, * * * * station or office * * * * where freight and passengers, respectively, are received for transportation." Interstate Commerce Act, Section 6, U. S. Compiled Statutes 1, 3156. The evidence and the facts found by the trial court, quoted above, affirmatively show that these requirements had not been met by the plaintiff in error prior to the time of the shipments complained. "Shippers are not affected by the Act until the required publication of rates has been made, and, to bring them within its operation in a given case, the burden is upon the carriers to show compliance with the condition precedent. If the contest be with reference to a shipment over a single line, the carrier, to have the benefit of the act, against its patron, must show publication at each of its stations." Atlanta,

K. & N. Ry. Co. vs. Horne, 106 Tenn., 73. Here we have a "contest in reference to a shipment over a single line," with no publication whatever of its schedule of freight rates between the points of shipment; and no evidence showing, or tending to show, that the schedules had ever been posted at any station, depot or office of plaintiff in error; or that a copy thereof was in possession of any of its agents, except the local agent at Cisco.

When it is remembered that the agent of plaintiff in error at Cisco, who had been its station agent at that point for about fifteen years, could not, from an inspection of the printed schedule relied upon by plaintiff in error, determine the frieght rate on cotton seed, in car load lots, between Moreauville and Cottonport, in the State of Louisiana, and Cisco, Texas, (Testimony of the witness Langston, Record p. 52, Paragraph 5, Trial Court's Conclusion of Facts, Record p. 30) and that no publication whatever of the schedule was attempted to be shown, it occurs to us that it would be hard, indeed, to hold defendant in error bound by the schedule, or that the facts were sufficient to oust the state court of jurisdiction of the case.

2. Except in cases where jurisdiction over the subject matter of litigation is conferred exclusively on the Federal courts, as a matter of pleading, the presumption is in favor of the jurisdiction of the state court and against that of the Federal court. Where there is nothing on the face of the pleadings of the plaintiff, or complainant, as in this case, to show that the cause is one which falls exclusively within the jurisdiction of the Federal courts, it is the duty of the defendant to show, by proper allegations in its answer, that the state court has no jurisdiction; and, it being necessary to allege such facts, it follows as corollary, that the facts alleged must be proven by competent evidence.

The first count, or statement of the cause of action of defendant in error, set out in first amended original petition, stating an action cognizable by the district court of Texas, it was the duty of plaintiff in error, if it wished to challenge the jurisdiction of that court, to allege and prove such facts as would show that the Federal Court, alone, had jurisdiction of the subject matter involved. In its special answer filed in the district court, plaintiff in error alleged, among other things, "that said schedule of rates were promulgated, published and posted by it (plaintiff in error) in accordance with the provisions of the Interstate Commerce Law;" it is further alleged, in sub-

stance, that the freight rate on cotton seed between the points of shipment and the destination, was sixty-seven *(67)* cents per 100 pounds; that the freight rate on cotton seed between the initial and terminal points having been thus established, plaintiff in error "was not authorized, and could not, in accordance with law, legally have demanded or collected from plaintiff a lesser or greater rate for the transportation of cotton seed from Moreauville and Cottonport, in Louisiana, to Cisco, Texas, than 67 cents, as was provided in the schedule of rates promulgated, PUBLISHED and POSTED by this defendant in accordance with the terms and provisions of the Interstate Commerce Law of the United States of America, as aforesaid." (Printed Record pp. 17-18.) Having alleged these facts as a bar to recovery by defendant in error, it became, and was, the duty of plaintiff in error to prove them.

Of course, we understand that the question of jurisdiction, in so far as the subject matter of the action is concerned, is one which may be taken advantage of at any stage of the proceedings, or of which the court will of its own motion, take cognizance; but a mere allegation of facts showing want of jurisdiction, standing alone, and without any proof to support the allegation, is not sufficient to defeat the jurisdiction of a court which has assumed to determine a controversy between litigants.

In this cause the plaintiff in error, for the purpose of defeating the jurisdiction of the state courts, relies wholly upon the enactment of the Interstate Commerce Act by the Federal Congress. The facts adduced in evidence on the trial of the cause, and the findings of fact by the district court, which are binding on this Court, do not show that plaintiff in error had complied with the provisions and requirements of the Interstate Commerce Act prior to the time of the shipments in controversy; the district court found as a fact, that "no evidence, however, was offerred as to whether or not said book of freight rates and classifications were or were not actually on file at Cottonport and Moreauville, and the court makes no finding as to that fact." (Printed Record, p. 30.) An examination of the fact given in evidence will show that no evidence was offered to prove that such schedules of freight rate had been posted at any depot, station or office of plaintiff in error prior to the shipments in controversy. As paintiff in error had alleged a full and complete compliance with the requirements of the Interstate Commerce Law in respect to the prinit-

ing, publishing and posting of its freight rates, it evidently considered proof thereof as being essential to defeat defendant in error; the fact that it had, or had not, complied with the law, was peculiarly within its own knowledge, and the failure to prove compliance must be taken as conclusive of the fact that it had failed to do so. Plaintiff in error certainly will not be permitted to take advantage of a Federal statute which it has ignored, or with the requirements of which it has failed to comply.

Plaintiff in error having failed to print, publish and post its purported interstate freight rates in accordance with the requirements of the Interstate Commerce Act, the shipments under consideration, and the freight rates thereon, are governed and controlled by the common law, which prohibits unjust and unreasonable freight charges by a common carrier, and the state courts had jurisdiction to hear and determine the controversy.

Defendant in error respectfully submits that the judgment of Court of Civil Appeals for the Second Supreme Judicial District of Texas ought to be affimed by this Court.

J. J. BUTTS,

Counsel for Defendant in Error.

Supreme Court of the United States.

No. 79.—October Term, 1906.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* The Cisco Oil Mill.	In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

[February 25, 1907.]

Mr. Justice White delivered the opinion of the Court.

This writ of error is prosecuted to obtain the reversal of a judgment for $641.69, with interest, entered in favor of the Cisco Oil Mill by the Court of Civil Appeals of Texas upon the reversal of a judgment of a District State court in favor of the Texas and Pacific Railway Company. The action was brought by the oil company to recover of the railway company the principal sum just stated, because of alleged overcharges by the railway company, paid by the oil company under protest at the time of the delivery of four cars of cotton seed, shipped in the month of September, 1901, from towns in Louisiana east of Alexandria, in that State, to Cisco, Texas. The appellate court, after excluding as surplusage averments in the petition "evidently designed to bring the case within the provisions of the Interstate Commerce Act," was of opinion and decided the case upon the hypothesis that the petition stated a valid cause of action at common law for the recovery of the sums coercively collected upon the delivery of the merchandise, in excess of a reasonable rate, and adopted the finding of the trial court as to the amount of the unreasonable exaction.

In its opinion the Court of Civil Appeals expressly declared that the trial court had rendered judgment in favor of the railway company because the rate demanded and collected of the oil company "was in accord with appellee's rate sheets and freight schedule which had been filed with the Interstate Commerce Commission and promulgated as provided by the act of Congress." Deciding, however, that the case before it presented "substantially the same questions upon substantially the same state of facts" which had been passed on in the case of *Abilene Cotton Oil Co.* v. *Texas & Pacific Railway Company*, the court, for the reason given by it in that case, reversed the trial court and rendered judgment in favor of the Cisco Oil Mill.

The considerations which made necessary our decision, just announced, reversing the judgment of the Court of Civil Appeals in the Abilene case,

equally apply in the instant case and compel like action. And this result follows despite the contention that a right of action existed, because it is assumed no schedule rate was in existence when the shipments were made. This was based on the claim that it was not affirmatively found below that the schedule of rates applicable to the shipments in question had been posted as required by section 6 of the act to regulate commerce, noted in margin.*

The assumption, it is insisted, is authorized because, it is asserted, the conclusion that the schedule of rates became legally operative was not justified by the finding that such schedule had been filed with the Interstate Commerce Commission and copies thereof furnished to the freight officers of the railroad company at Cisco and other points. The contention is without merit. The filing of the schedule with the commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirement that schedules should be "posted in two public and conspicuous places in every depot," etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates *actually in force*. To hold that the clause had the far-reaching effect claimed would be to say that it was the intention of Congress that the negligent posting by an employe of but one instead of two copies of the schedule, or the neglect to post either, would operate to cancel the previously established schedule, a conclusion im-

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*First paragraph of section 6 of the Act to Regulate Commerce, as amended March 2, 1889 (25 Stat. L. 855):

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

possible of acceptance. While section 6 forbade an increase or reduction of rates, etc., 'which have been established and published as aforesaid," otherwise than as provided in the section, we think the publication referred to was that which caused the rates to become operative; and this deduction is fortified by the terms of section 10 of the act making it a criminal offense for a common carrier or its agent or a shipper or his employe improperly "to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier."

Whether by the failure to post an established schedule a carrier became subject to penalties provided in the act to regulate commerce, or whether if damage had been occasioned to a shipper by such omission, a right to recover on that ground alone would have obtained, we are not called upon in this case to decide.

The judgment below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.